

Dr. Wahbah Al-Zuhaylī's  
*Al-Fiqh Al-'Islāmī wa 'Adillatuh*  
(Islamic Jurisprudence and Its Proofs)

# Financial Transactions in Islamic Jurisprudence

## Volume 2

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

*In The Name of Allāh, The Most Gracious, The Merciful*

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May Allāh reward all our efforts and good intentions.

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## Part VIII

### Guaranty *Al-Kafālah*



## Preliminaries

Guaranty is known by many names in Arabic: *kafālah*, *ḥimālah*, *ḍamānah*, and *zaʿāmah*. The prominent Shāfiʿī jurist Al-Māwardī said that the first name is used in guaranteeing individuals, the second in guaranteeing blood money, the third in guaranteeing debts, and the fourth in guaranteeing substantial financial sums. In this regard, a financial guaranty of a debt, retaliatory financial compensation (*qiṣās*), or other obligations, in the presence of the obligated party, are also called a credit guaranty (*kafālah bil-nafs* or *kafālah bil-wajh*).

We shall discuss the guaranty contract in five chapters:

1. Legality, definition, cornerstones, and contract language.
2. Conditions of contract validity.
3. Legal status.
4. Contract termination.
5. Guarantor's right to seek compensation from obligated party.



## Chapter 57

# Legality and Cornerstones

### 57.1 Legality

We can generally say that the guaranty contract (*al-kafālah*) is legalized by proofs from the Qur’ān, the Sunnah, and juristic consensus (*‘Ijmā‘*):

- Proof is found in the Qur’ān in the verse: “For the one who produces it [the King’s beaker] is the reward of a camel load: I will be his *Za‘īm*” [12:72]. ‘Ibn ‘Abbās stated that *Za‘īm* is another word for *Kafīl*, i.e. guarantor.
- Proof is provided in the Sunnah in the *Ḥadīth*: “The guarantor (*Al-Za‘īm*) is a debtor”. This *Ḥadīth* was narrated by ‘Abū-Dāwūd, Al-Tirmidhī, and ‘Ibn-Ḥibbān, with the latter two rendering it a valid *Ḥadīth* (*Ṣaḥīḥ*).<sup>1</sup>

Al-Bukhārī also narrated in his *Ṣaḥīḥ* that the Prophet (pbuh) came to the funeral of a man to pray on his soul. He asked those present: “did he leave any wealth?”, they said “No”. Then he asked, “did he die with any debts outstanding?”, and they said “yes, he owed two Dinārs”.<sup>2</sup> The Prophet (pbuh) was thus about to leave, and said “then you pray on your companion”. At that time, ‘Abū Qatādah said: “I guarantee his debt, Oh Messenger of Allāh”, and the Prophet (pbuh) prayed on his soul.<sup>3</sup>

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<sup>1</sup>This *Ḥadīth* was narrated on the authority of three companions of the Prophet (pbuh): ‘Abū ‘Umāmah Al-Bāhiliy, ‘Anas ibn Mālik, and ‘Abdullāh ibn ‘Abbās. Its verification and chains of narration were discussed previously (c.f. Al-Tirmidhī’s *Jāmi‘*, vol.6, p.295).

<sup>2</sup>Another narration states that his debt was three Dinārs.

<sup>3</sup>Narrated by Al-Bukhārī, ‘Aḥmad, Al-Nasā’ī, and ‘Ibn Ḥibbān on the authority of Salamah ibn Al-‘Akwa’. Also narrated by ‘Aḥmad, and the authors of *Sunan* with the exception of ‘Abū Dāwūd on the authority of ‘Abū Qatādah, and Al-Tirmidhī considered this chain of narration valid. The narrations of Al-Nasā’ī and ‘Ibn Mājah state explicitly the term *kafālah* in ‘Abū Qatādah’s statement. Another narration is provided by ‘Aḥmad, ‘Abū-Dāwūd, Al-Nasā’ī, ‘Ibn Ḥibbān, Al-Dāraqūṭnī, and Al-Ḥākim on the authority of Jābir ibn ‘Abdullāh. *Ḥadīths* of similar imports were narrated by Al-Dāraqūṭnī and Al-Bayhaqī on the authority of ‘Abū Sa‘īd Al-Khudriy, based on weak chains of narration. Another similar narration was also provided by Al-Bazzār on the authority of ‘Abū Hurayrah with a strong chain of narration. The narration that renders the guarantor of the two-Dinār debt to be ‘Alī ibn ‘Abī Ṭālib



- There is also a consensus among Muslims that guaranty is permissible, due to dire need for such contracts in financial dealings, and to protect debtors.<sup>4</sup> Thus, all jurists agreed on the general legality of guaranty contracts, even though there are some differences in their detailed rulings, as we shall see. In this regard, we note that a guaranty wherein the guarantor has good intentions is considered a righteous act, for which Allāh will reward the guarantor. However, in practice, a guaranty is immediately followed by the guarantor blaming himself and being blamed by others, then he regrets his act when demanded to pay on behalf of the guaranteed party, and he finally loses some of his property.<sup>5</sup>

Guaranty contracts are legalized since they are a means for ensuring the rights of economic agents through cooperation between people. Thus, it makes dealings in loans and simple loans safer, and makes the means of ensuring such safety less intrusive for the debtor.

## 57.2 Definition

The Ḥanafīs define *kafālah* as making the guaranteed person’s liability a joint liability of the guaranteed and guarantor at the time of demanding compensation. Thus, any individual, property, usurped object, or other item that can be demanded from the former can also be demanded from both parties by virtue of the guaranty. However, the liability is not established on the guarantor alone, and it is never dropped for the guaranteed.<sup>6</sup> In this regard, the Ḥanafīs and Ḥanbalīs use the term “conjoining” (*al-ḍamm*), while the Shāfi‘īs use the term “obligation” (*al-’iltizām*). The Ḥanafī terminology is the appropriate one in this context.

The Mālikīs, Shāfi‘īs, and Ḥanbalīs all held a stronger notion as given in ‘Ibn Qudāmah ( ): that a guaranty is a conjoining of the guarantor’s liability to the liability of the guaranteed. Thus, the debt would be established as a joint liability on both of them.<sup>7</sup>

In this regard, we note that the creditor’s right is not increased by conjoining the guarantor’s liability to that of the guaranteed. This follows from the fact that the creditor is still entitled to one repayment, either from the guarantor or from the original debtor.

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has a weak chain of narration, as noted by ‘Ibn Ḥajar. See ‘Ibn Ḥajar (, p.250 onwards), Al-Haythamī (, vol.4, p.127), Al-Ṣan‘ānī (2nd printing, vol.13, p.62), Al-Shawkānī (, vol.5, p.237 onwards).

<sup>4</sup>Al-Ṣan‘ānī (2nd printing, vol.3, p.62), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.160 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.198), ‘Ibn Qudāmah (, vol.4, p.534).

<sup>5</sup>Some of the companions of the Shāfi‘ī jurist Al-Qafāl: it is written in the Torah that guaranty is discouraged; it begins with blame, progresses to regret, and ends with loss of property.

<sup>6</sup>‘Ibn Al-Humām ((Ḥanafī), vol.5, p.389), Al-Kāsānī ((Ḥanafī), vol.6, p.2), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.260).

<sup>7</sup>Al-Dardīr ((Mālikī)A, vol.3, p.329), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.198), ‘Ibn Qudāmah (, vol.4, p.534).



We also note that the establishment of a mutual debt - as established by guarantees - is permissible. In this regard, a debt is a legal (rather than actual) consideration which can be established as a multiple liability on multiple parties. This is contrasted to non-fungible items that cannot be established simultaneously in two actual places.

A proof that the debt of the guaranteed party is established as a liability on the guarantor is the fact that the guarantor is eligible to accept the debt as a valid gift, which the guarantor may then give to the original debtor. This is an exception to the general rule that debts may not be offered as gifts to any party other than the debtor, thus establishing that the guarantor is considered a joint debtor. A second proof is also provided by the ruling that the creditor may buy an item from the guarantor in exchange for the debt. This too is in contrast to the general rule that debts may not be used as prices in trades with a party other than the debtor, thus establishing that the guarantor is legally considered a mutual debtor.

The Ḥanafīs support their alternative definition, whereby mutual indebtedness is not established for the guarantor and guaranteed, by arguing that legal status should only be established by a reason. Thus, even though mutual indebtedness may indeed be established, there is no reason to establish such mutual indebtedness except if the right to demand repayment is established. In this regard, they argued that the permissibility of giving the debt as a gift to the guarantor, or using it to buy goods from him, can be established by considering the debt two debts in order to render the creditor's action valid.<sup>8</sup>

The Ḥanafīs provide further proof for their alternative definition by arguing that guaranties can apply to individuals and non-fungible properties as well as to fungible debts. Thus, their definition of guaranty as a right to demand such items from the guarantor makes it more general than simply guaranteeing liabilities of fungible property. Thus, we see that the Ḥanafī definition is indeed more general. In fact, the other schools intended the restrictive definition of mutual indebtedness only in the case of financial guaranties, and agree with the Ḥanafī definition for other liabilities. Thus, we might take the Ḥanafī definition as the correct one.

However, in practice, the Ḥanafī 'Ibn 'Ābidīn argued that all jurists agree that financial guaranties establish the debt as a liability on the guarantor without excusing the original debtor from that liability. As proof, he provided the previously discussed examples of giving the debt as a gift to the guarantor, or using it as a price in a sale. Moreover, he argued that if the joint liability was only established if repayment is demanded, it would not have been possible to rule that the debt can be collected from the estate of a deceased guarantor, since death negates the right to demand the debt from him in analogy to other types of guaranties. However, Ḥanafīs do in fact rule that debts may be collected from the estate of a deceased guarantor. 'Ibn 'Ābidīn provides further proof for his acceptance of the principle of mutual indebtedness by the ruling that the amount guaranteed by one guarantor may be guaranteed by a third party, thus

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<sup>8</sup>ibid.



establishing that the first guarantor is in fact a debtor.

The difference between the two definitions (mutual indebtedness vs. mutual indebtedness only at the time of repayment demand) can be highlighted in a specific example. If the guarantor were to take an oath that he is not indebted, he would thus be considered a liar according to the first definition, but not according to the second.

### 57.3 Cornerstone

For 'Abū Ḥanīfa and Muḥammad, the cornerstones of a guaranty contract are the guarantor's offer, and the debtor's acceptance.<sup>9</sup> On the other hand, 'Abū Yūsuf and the majority of jurists define the guaranty cornerstone as the offer alone, thus excluding acceptance from the contract cornerstones.<sup>10</sup>

Thus, a guaranty contract is concluded through the sole action of the guarantor in guaranties of wealth or person. In this regard, the majority of jurists - with the exception of 'Abū Ḥanīfa and Muḥammad - do not require the debtor to accept the guaranty, since such acceptance was not mentioned in the above mentioned *Ḥadīth* of 'Abū Qatādah. In that *Ḥadīth*, the offer of guaranty by 'Abū Qatādah was sufficient to establish it, and thus to convince the Prophet (pbuh) to pray on his soul. In this regard, guaranty is similar to vows, whereby the guarantor establishes upon himself a liability for whatever the debtor was required to pay.<sup>11</sup>

On the other hand, there is a consensus that consent of the creditor is not required, since repayment of another's debt does not require his consent, and hence a vow to repay does not require his consent either. Moreover, all jurists with the exception of 'Abū Ḥanīfa permit guaranty of a deceased person's debts even if he died in a state of bankruptcy, providing further proof that the creditor's consent is not required.

The non-Ḥanafī jurists enumerate four cornerstones for the guaranty contract:<sup>12</sup> (i) an eligible guarantor who can deal in his own property; (ii) a guaranteed right for which proxy is permitted (e.g. debts and guaranteed non-fungible properties; to the exclusion of physical penalties and retaliations, in which no proxy is permitted); (iii) guaranteed individual (i.e. any debtor, alive or dead); and (iv) contract language (the offer of guaranty). The Shāfi'is added the creditor as a fifth cornerstone.

<sup>9</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.261).

<sup>10</sup>'Ibn Al-Humām ((Ḥanafī), vol.5, p.390), Al-Kāsānī ((Ḥanafī), vol.6, p.2), 'Ibn 'Ābidīn ((Ḥanafī), ibid.), *Majma' Al-Damānāt* (p.275).

<sup>11</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.200), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.340), 'Ibn Qudāmah (, vol.5, p.535).

<sup>12</sup>'Ibn Juzayy ((Mālikī), p.325), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.198), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.104).



### 57.3.1 Guaranty language

The guaranty contract requires precise language for its establishments. In this regard, the Ḥanafīs and Shāfi‘īs permitted explicit and implicit indications of guaranty, through any language that customarily signifies trust.<sup>13</sup> In this regard, explicit language of guaranty would state “I guarantee the debt of so-and-so”, “I am responsible for so-and-so’s debt”, “you can collect this debt from me”, “leave this to me”, etc. On the other hand, the guarantor may establish guaranty indirectly by saying “leave so-and-so, and his debt is mine”, “I guarantee so-and-so”, or “I am liable for so-and-so’s guaranty”, etc. In this regard, if the guarantor indicates guaranty of a material or physical debt, then the guaranty is established, otherwise it is nugatory.

However, if the guarantor says “I owe so-and-so thus-and-thus”, the language may mean that the named person had deposited an item with him, or that he had established a liability for that item through guaranty. If this language is used without further specification, then it is taken to mean that he is a depositary, unless the item is fungible, in which case it is considered a liability, since fungibles can only be established thus.

### 57.3.2 Types of guaranty

There are two modes of guaranty: physical (*kafālah bi-l-nafs*), and financial (*kafālah bi-l-māl*). Thus, a physical guaranty is established if the guarantor says: “I guarantee to bring so-and-so”, “I guarantee his neck”, “his soul”, “his body”, “a portion of him”, etc. In this regard, the juristic principle states that “specifying part of an indivisible object is tantamount to specifying the whole”.<sup>14</sup> Thus, any such specification implies full guarantee of the specified individual.<sup>14</sup> This is in contrast to the case where a guarantor guarantees an individual’s arm or leg (which are separable from the person himself). Physical guaranty is also established if the guarantor says “I guarantee so-and-so”, “I am responsible for so-and-so”, etc.; but not established if he says “I guarantee whatever he wishes”.

### 57.3.3 Modes of guaranty

A guaranty may be unrestricted, or restricted by description, suspended pending a condition, or deferred to a future time.<sup>15</sup>

<sup>13</sup>Ibn Al-Humām ((Ḥanafī), vol.5, p.292), Al-Kāsānī ((Ḥanafī), ibid.), Ibn ‘Abidīn ((Ḥanafī), vol.4, p.264), *Majma‘ Al-Ḍamānāt* (p.265), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), ibid., p.206), *Ḥāshiyat Qalyūbī wa ‘Umayrah* (vol.2, p.330).

<sup>14</sup>This is similar to the case where a man initiates half a divorce, which counts as a full divorce, since divorces are indivisible. This is in contrast to financial guaranties, whereby an individual can guarantee half the debt of another, since financial debts are divisible.

<sup>15</sup>See the full classification in Al-Kāsānī ((Ḥanafī), vol.6, p.3), Ibn Al-Humām ((Ḥanafī), vol.5, pp.404,411).



### A. Unrestricted guaranty

An unrestricted guaranty is valid subject to the conditions we shall list shortly. However, we should note that it is nevertheless restricted by the nature of the guaranteed debt. Thus, the guaranty is currently due or deferred according to whether the guaranteed debt is current or deferred.

### B. Restricted guaranty

A guaranty may be restricted by description (e.g. deferred or current). Thus, it is valid to restrict a guaranty through deferment to a specified date. In this regard, the term of deferment of guaranty may and may not coincide with the term of deferment of the guaranteed debt. This follows since the right to demand repayment is a legal right of the creditor, who may thus agree with the guarantor and debtor on any conditions that are mutually agreeable.

In the case of a current debt, it is permissible to have a deferred guaranty, since – according to the majority of jurists – the debtor may still benefit legally from such deferment. In this regard, if deferment of the guaranty is specified in the initial contract, it automatically renders the debt deferred. However, if deferment of the guaranty is specified after the conclusion of the initial contract, then it only affects the guarantor. In the latter case, if the creditor initiates the debt deferment, the guarantor may proceed accordingly, but the guarantor may not defer the guaranty without the debtor’s consent. This follows from the fact that deferment of the debt means deferment of demanding repayment, and may not be used to drop an established legal right.

The Ḥanafīs, Mālikīs, and Shāfi‘īs<sup>16</sup> ruled that if the guarantor or the debtor were to die during the deferment period, the deferment term continues to be valid, and the rights and liabilities are established for and on the estates of the deceased. The Ḥanafīs base this opinion on the general principle that death obliterates an individual’s liabilities and eligibility for dealing, except for transactions that are necessary to satisfy legal rights that were established during his life. On the other hand, there are two reported opinions in the Ḥanbalī school, of which ‘Ibn Qudāmāh prefers the view that the term of deferment remains intact, and it is not permitted for the creditor to demand repayment earlier, in analogy to the case where the guarantor remains alive.<sup>17</sup>

The Ḥanafīs, Ḥanbalīs, and Mālikīs permit guaranty with a vaguely specified term of deferment, provided that it is a customarily used term of deferment (e.g. until harvest time, etc.). They rule thus based on the view that this introduces minor ignorance that can be tolerated in guaranties. On the other hand, Al-Shāfi‘ī did not permit such imprecise terms of deferment in guaranties.<sup>18</sup> All

<sup>16</sup>Al-Kāsānī ((Ḥanafī), *ibid.*), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.28), Al-Ṭahāwī ((Ḥanafī), p.105), Al-Dardīr ((Mālikī)A, vol.3, p.337), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.208).

<sup>17</sup>Ibn Qudāmāh (, vol.5, p.545).

<sup>18</sup>Ibn Qudāmāh (, *ibid.*, p.560), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.307), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.172), *Majma‘ Al-Ḍamānāt* (p.273), *Al-Farā‘id Al-Bahīyyah fī Al-Qawā‘id Al-Fiqhiyyah* (p.142).



schools agree that an unknown and unusual term of deferment of guaranty (e.g. until it rains, etc.) introduces excessive ignorance and is thus rendered invalid. However, while the deferment condition is rendered invalid, the guaranty itself remains valid.

On the other hand, if the guaranty is current, the creditor may demand immediate establishment of the liability, whether or not the debt itself is current or deferred. Symmetrically, if the guarantor establishes a current liability for the guaranteed debt, the creditor is entitled to defer it, thus deferring his own right.

In summary, all four schools of jurisprudence permit deferred guaranties of current debts, as well as current guaranties of deferred loans. This follows from the fact that guaranty is a voluntary contribution that meets a financial need in human transactions, and thus they are valid in any form stipulated by the guarantor.<sup>19</sup> In this regard, 'Ibn Mājah narrated in his *Sunan* that the Prophet (pbuh) guaranteed a debtor for one month.

In the case of physical guaranties, it is permissible for a person to guarantee the safe delivery of another for a specified term (e.g. one month, three days, etc.). In this case, the majority of jurists agree that the guarantor is required to deliver the guaranteed person at the end of the specified period, and not responsible for immediate delivery. However, 'Abū Yūsuf ruled that the guarantor may be required to deliver the guaranteed person at any time, and is only relieved of his responsibility once the specified period expires. This latter ruling agrees with common custom, and it also agrees with Al-Ḥasan ibn Ziyād and Al-Qāḍī Al-Nasafī, and many jurists have given this opinion as their official *fatwā*.<sup>20</sup>

### C. Suspended guaranty pending a condition

The Ḥanafīs permit a guaranty contract that is suspended pending a condition, provided that the specified condition agrees with the consequences of the contract; e.g. if the condition establishes or facilitates the satisfaction of a legal right. For instance, the guarantor may say “I guarantee delivery of the merchandise once it is due”, or “once the guaranteed debtor arrives, I guarantee his debt”. The guarantor may also make the guaranty conditional on events that make collecting a debt difficult, e.g. “if so-and-so leaves town, I guarantee his debts”.

On the other hand, any conditions that do not satisfy that general principle (e.g. suspension until it rains, or until someone enters his house, etc.) are rendered nugatory, and the guaranty is established immediately.<sup>21</sup> In general, it is thus permitted for a guaranty to be suspended pending events that establish

<sup>19</sup> Al-Kāsānī ((Ḥanafī), *ibid.*), Al-Dardīr ((Mālikī)A, vol.3, p.331), Al-Ramlī ((Shāfi'ī), vol.3, p.416), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.207), 'Ibn Qudāmah (, vol.4, p.544).

<sup>20</sup> *Majma' Al-Damānāt* (p.266).

<sup>21</sup> 'Ibn Al-Humām ((Ḥanafī), vol.5, p.414), Al-Kāsānī ((Ḥanafī), vol.6, p.4), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.277), *Majma' Al-Damānāt* (p.273), *Al-Farā'id Al-Bahiyah fī Al-Qawā'id Al-Fiqhiyyah* (p.142).



a right or the ability to collect that right, but not pending unconventional events such as rain. However, the Shāfi'is ruled that it is not permitted to suspend a guaranty pending the arrival of the new month.<sup>22</sup>

### Suspending financial guaranty on physical guaranty

If a person guaranteed another, e.g. by saying “if I do not bring him tomorrow, I guarantee his debts”, and then he did not bring him, or the guaranteed individual died, the Ḥanafis ruled that the guarantor is liable for the guaranteed property. In this case, there are in fact two guaranties, one physical and one financial, whereby the physical guaranty was unconditional and the financial was conditional on not satisfying the physical. Such suspension of the second guaranty is permissible provided that the debtor acknowledged his debt, or that a judge ruled thus.<sup>23</sup> On the other hand, the Shāfi'is ruled that the guarantor does not guarantee the property in this case.<sup>24</sup>

The Ḥanafis listed many similar instances under this heading. For instance, they considered the case where a guarantor guarantees an individual, and stipulates that if he does not deliver him the next day, he owes the creditor \$1000. In this case, if he did not specify that he owes the creditor “the \$1000 claimed to be owed by the guaranteed”, and if the debtor denied the debt, the Ḥanafis differed in the rulings. Thus, 'Abū Ḥanīfa and 'Abū Yūsuf ruled that the guarantor still owes the \$1000, whereas Muḥammad ruled that he does not. The first two argued based on the text of the guaranty which guarantees delivery of the \$1000. On the other hand, Muḥammad argued that this is an instance of offering to pay an amount of money without an established liability, and subject to the occurrence of a risky event. In this regard, a liability would not be viewed as risky if it were established, but guaranteeing a fixed amount of money irrespective of liabilities makes it a risky offer.

On the other hand, if a person guarantees another with a financial compensation, and tells the creditor “if I bring him to you tomorrow, I am exonerated of the financial liability”, then some jurists rule that he is thus exonerated. This opinion is based on the view that exoneration is not thus caused by delivery. Rather, they argue, delivery was the objective of the contract, and the financial compensation guarantee was stipulated to guarantee such delivery.

However, the more accepted opinion is the view that the guarantor is not thus exonerated of the financial responsibility. This opinion is based on the view that exoneration cannot be made suspended pending the condition of delivery. This in turn is based on the general principle that exoneration results in transfer of property, which cannot be suspended pending a condition.<sup>25</sup>

<sup>22</sup> Al-Ramlī ((Shāfi'ī), vol.3, p.415), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.341), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.207).

<sup>23</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.4 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.396), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.176), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.269), *Majma' Al-Damānāt* (p.266 onwards).

<sup>24</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.25 onwards).

<sup>25</sup> Al-Kāsānī ((Ḥanafī), *ibid.*), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.178).



**D. Deferred guaranty**

The Ḥanafīs permit deferred guaranties. Thus, they permit one person to guarantee for another whatever he lends in the future to a specified party. They also permit guaranteeing any property that the third party may consume or usurp, and guaranteeing the price in a sale. In all such cases, the guaranty is valid since it is thus suspended pending a condition that results in establishing the right to be guaranteed. Thus, civil law has permitted suspending guaranty pending a condition or deferring it to a future time.

**Options in guaranty**

There is a consensus among jurists that no options are permitted in guaranty conditions. In this regard, options are permitted in cases where information can be obtained about uncertain objects. However, a guarantor knows what he guarantees and there is no uncertainty involved. Moreover, the guaranty contract does not require acceptance, in analogy to vows, and thus does not permit the establishment of any options.<sup>26</sup>

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<sup>26</sup>Ibn Qudāmah (, vol.4, p.555).



## Chapter 58

# Guaranty Conditions

Conditions of a guaranty contract may pertain to the language of the contract, the guarantor, the debtor, the creditor, or the object of guaranty. In this terminology, the guarantor is the one who would be required to pay what the debtor owes the creditor (be it property or an individual).

### 58.1 Contract language conditions

There are three conditions for the language of a guaranty contract:

1. The language must explicitly or implicitly denote guaranty (e.g. “I guarantee so-and-so’s debt to you”, “the debt so-and-so owes you is now mine”, etc.).
2. The language must signify the establishment of guaranty, thus invalidating guaranties suspended on uncommon conditions (e.g. “if so-and-so returns from his travel, then I guarantee so-and-so’s debt”, “if you do such-and-such, then I shall guarantee delivering so-and-so”, or “if it rains, then I guarantee such-and-such”). This follows since guaranty is a contract the consequences of which are established immediately, and thus may not be suspended thus.
3. A guaranty may not be timed in financial guaranty, wherein the objective is repayment, or physical guaranty, wherein the objective is delivery. However, it is permitted to guarantee delivery of an individual immediately, with a condition of deferment of his delivery. It is also permitted to conclude a guaranty of paying a current debt, with a condition of deferment of guarantor payment. In such cases, the permission is granted since the guarantor may not be able to deliver immediately. On the other hand, it is permitted to establish an immediate guarantee of a deferred debt, since it involves voluntary prepayment. However, as we have seen, the guarantor in the latter case is not bound to prepay, and he may exercise the initial debtor’s right to pay after the specified deferment term.



## 58.2 Guarantor conditions

Ḥanafī and other jurists stipulated two main conditions for the guarantor:<sup>1</sup>

1. The guarantor must be eligible for making voluntary contributions. Thus, guaranty is not concluded by a child or an insane person. This follows since guaranty is a contract that entails voluntary contribution to make a payment. While all jurists agree on this eligibility condition, the Shāfi'īs add a condition of being of good religion. The Mālikīs, on the other hand, deviated from the majority of jurists by restricting a woman's ability to act as guarantor with more than one-third of her wealth. This ruling follows from their general restriction of women in dealing with more than one third of their wealth lest the husband may suffer a loss. Thus, in their school, if she guarantees with more than one third of her wealth, the guaranty is not binding on her, and it is suspended pending approval of her husband.

In this regard, guaranties initiated by an individual on his death bed are restricted by the rules of inheritance in the same manner that all his voluntary contributions are restricted. Thus, he may not make such guaranties for more than one third of his property, and if he does, the guaranty would be deemed suspending pending the approval of his heirs.

2. The condition of executability of guaranty is freedom to perform transactions. Thus, guaranties may not be initiated by a slave, who may not make voluntary contributions without his master's permission. However, in the stated case, the guaranty would be established, and the slave may be demanded to satisfy its obligations upon obtaining his freedom.

## 58.3 Debtor conditions

There are two conditions for the debtor whose debt is being guaranteed:<sup>2</sup>

1. 'Abū Ḥanīfa stipulated a condition that the guarantor must be capable of delivering what he guarantees, either directly or through an agent. Thus, he ruled that it is not valid to establish a guaranty for the debt of a deceased individual who died in a state of bankruptcy (i.e. his estate cannot pay his debts). In this case, he ruled that the debt is dropped in a manner analogous to exoneration, and thus may not be guaranteed. Thus, he argued, all liabilities on the juristic personality of the deceased would have perished, and no debt would remain. Since guaranty is conjoining

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.5 onwards), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.8), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.262), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.159), Al-Dardīr ((Mālikī)B, vol.3, p.433), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), p.325), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.103), 'Ibn Qudāmah (, vol.4, p.541 onwards).

<sup>2</sup>Al-Kāsānī ((Ḥanafī), ibid., p.6), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, pp.262,278), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.419).



one person's liability to another, he ruled that there is no guaranty in this case.

However, 'Abū Yūsuf, Muḥammad, and the majority of jurists ruled<sup>3</sup> that it is valid for a guarantor to guarantee the debts of a bankrupt deceased individual. They based their ruling on the above mentioned *Ḥadīth* of 'Abū Qatādah, whereby he guaranteed the debts of a deceased person whose estate could not repay his debts. Moreover, the Prophet (pbuh) encouraged his companions to guarantee the debts of the deceased in that *Ḥadīth* by asking if one of them would guarantee his debts. They argued further that the debts of a deceased person are established debts nonetheless, and thus may be guaranteed whether or not the deceased left enough wealth to repay them. As proof of this assertion, they cite the fact that the creditor is permitted to collect repayment of such debts from a guarantor, whether or not the debtor died prior to the establishment of the guaranty.

2. Ḥanafī jurists argued that the guarantor must know the debtor whose debts he guarantees. Thus, they ruled that it is not valid for a guarantor to simply say "I have guaranteed what some person owes". They based this ruling on the view that such guaranties are unconventional. Moreover, they said that this condition is necessary to know whether the debtor is rich (and thus capable of paying his own debts) or poor, and whether or not he is worthy of such voluntary charitable contributions.

However, the Shāfi'is and Ḥanbalīs, and some other jurists, argued that it is not necessary for the guarantor to specify or know the guaranteed debtor. They based this ruling on analogy to the fact that consent of the debtor is not necessary. They also answered the aforementioned argument by saying that charity is charity, whether or not the recipient is worthy of it.<sup>4</sup>

Jurists agree that it is not necessary for the debtor to be present when the guaranty contract is initiated. Thus, it is permitted to guarantee the debts of an absent or incarcerated person. In fact, the need for guaranty usually arises precisely in this type of case.<sup>5</sup>

## 58.4 Creditor conditions

There are three conditions for the creditor:<sup>6</sup>

1. Ḥanafī jurists stipulated that the creditor must be known. Thus, they ruled that guaranteeing "somebody's debt" is not valid. They argued for

<sup>3</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.294), Al-Dardīr ((Mālikī)A, vol.3, p.331), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.339), 'Ibn Qudāmāh (, vol.4, p.537).

<sup>4</sup>Al-Khaṭīb Al-Shīrbīnī ((Shāfi'ī), vol.2, p.200), 'Ibn Qudāmāh (, vol.4, p.535).

<sup>5</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.294), Al-Kāsānī ((Ḥanafī), vol.6, p.6), Al-Khaṭīb Al-Shīrbīnī ((Shāfi'ī), vol.3, p.204).

<sup>6</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.6 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.417), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.9), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.280).



this condition based on the view that without knowing and specifying the creditor, the objective of guaranty, which is ensuring repayment, cannot be ascertained. Most of the Shāfi'is agree with this condition, based on the view that creditors vary in their intensity of demanding repayment, thus requiring specification of the creditor whose property is guaranteed.<sup>7</sup>

On the other hand, the Mālikīs and Ḥanbalīs permitted guaranteeing debts for unnamed creditors, e.g. "I guarantee the debts of Zayd that he owes other people". They find proof for their view in the verse: "They said: We miss the great beaker of the king; and for him who produces is the reward of a camel load; I will be bound by it" [12:72]. In this case, the speaker – an agent for Yūsuf (pbuh) – was not an owner, but he nonetheless promised a camel load for whoever produced the beaker, and bore the responsibility for this offer on behalf of Yūsuf (pbuh).<sup>8</sup>

2. 'Abū Ḥanīfa and Muḥammad ruled that the creditor or his agent must be present during the guaranty contract session. Thus, they ruled that the guaranty is not permitted if a guarantor guarantees to an absent creditor, even if the latter approves the guaranty once he hears of it. They based this ruling on the view that guaranty has the effect of transferring ownership, which thus requires offer and acceptance to complete the language of the contract.

There are two narrated opinions of 'Abū Yūsuf in this regard. The latter opinion renders guaranties for absent creditors valid. This ruling is based on the view that guaranty adds a liability on the guarantor, and it can thus be concluded by his offer alone. This is also the basis of the opinion of the majority of jurists, who ruled that guaranty contracts are concluded by offer alone.

3. The creditor must be sane. This condition follows from the previous condition for 'Abū Ḥanīfa and Muḥammad. Thus, the acceptance of guaranty by non-discerning children or insane individuals cannot render a guaranty contract valid in their opinion, since they require acceptance by an eligible party as a cornerstone of the contract.

## 58.5 Guaranteed object conditions

There are three conditions for the guaranteed object:<sup>9</sup>

1. The Ḥanafīs ruled that the object of a guaranty contract must be an established liability (fungible, non-fungible, a person, or an action), guaranteed by the debtor. In the case of non-fungible debts, the Ḥanafīs require

<sup>7</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), *ibid.*).

<sup>8</sup> 'Aḥkām Al-Qur'ān by 'Ibn 'Arabī, 'Ibn Qudāmāh (, vol.5, p.535 onwards).

<sup>9</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.7 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.402 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, pp.264,281), *Majma' Al-Damānāt* (p.271), *Rawḍat Al-Tālibīn* (vol.4, p.255), 'Ibn Qudāmāh (, vol.4, p.538 onwards).



this condition only for non-fungibles that are guaranteed by themselves.<sup>10</sup> This latter category includes usurped objects, received objects of a defective sale, and a received object of an unconcluded sale.

On the other hand, Ḥanafīs ruled that non-fungibles that are held as a possession of trust cannot be objects of guaranty, whether their delivery is not required (e.g. deposits and partnership capital), required (e.g. simple loans, and leased objects), or whether they are guaranteed by other objects (e.g. the object of sale prior to receipt, or a pawned object). In this regard, the objects of trust are not guaranteed, and those guaranteed by other objects are not guaranteed by themselves. For instance, if the object of sale were to perish prior to receipt, the seller is not required to make any payments, since the buyer's liability for the price is dropped. Similarly, if a pawned object were to perish, the pawn broker is not responsible to pay any compensation, since the debt of the owner is reduced by an amount equal to the value of that object.

Thus, the majority of jurists, and the better accepted opinion of Al-Shāfiʿī, ruled that guaranteed non-fungible items may be objects of a guaranty contract provided that they are guaranteed by the person possessing them at contract time. This ruling is based on the view that non-fungibles guaranteed by their possessors are similar to debts established as liabilities on such parties, and thus may be objects of a guaranty contract. The less supported opinion of Al-Shāfiʿī states that such non-fungibles are not established as fungible liabilities, and thus may not be objects of guaranty contracts. However, this opinion was rebutted by the fact that guaranties of such objects are in fact guarantees either to collect and deliver them, or to deliver their value if they had perished. Such responsibilities may indeed be guaranteed, in analogy to guaranteeing the quality of an object of sale, whereby the seller is responsible either to return the price or its value if the object of sale is found to be defective.

Moreover, the best accepted opinion of Aḥmad renders as valid guaranties of trusts such as deposits, leased objects, etc., if the holder guarantees the objects due to transgression.

The reference to guaranteed actions pertains to actions such as delivering the object of a sale or pawning. In such cases, the guaranty is valid, since such delivery is guaranteed by the appropriate party (seller or debtor), and thus may become guaranteed by the guarantor.

In this regard, it is permissible for the liable person to establish physical guaranty of delivering himself,<sup>11</sup> since that is thus a guaranteed action.

<sup>10</sup>In this regard, there are two types of non-fungibles, trusts and guaranties. Trusts include deposits, partnership property, silent-partnership property, objects of a simple loan, and a leased object in the possession of the lessee. In contrast, guaranteed objects may be guaranteed by themselves (e.g. usurped objects, etc.), or guaranteed by something else (e.g. the object of a sale is guaranteed by the price, and a pawned object is guaranteed by the debt).

<sup>11</sup>Physical guaranty refers to the case where the guarantor guarantees delivery of an individual who is the object of guaranty.



The majority of jurists –including those of the four major schools – approved physical guaranty based on financial liability. This opinion is based on the verse: “He said: I will never send him with you until you swear a solemn oath to me in Allāh’s name that you will be sure to bring him back to me unless you are yourselves hemmed and unable to do so” [12:66]. They also based it on the Prophet’s (pbuh) saying that the debtor is responsible to deliver what he owes, which covers both types of guaranty. In this regard, whatever is required to deliver based on a contract can be required to deliver based on a guaranty contract in analogy to property. Moreover, the guarantor may be in a position to deliver the individual by finding him and seeking the assistance of legal authorities to deliver him.

On the other hand, the argument of Al-Shāfi‘ī that physical guaranty is relatively weak refers to the fact that is weak based on reasoning by legal analogy. This weakness follows from the fact that a free person cannot be possessed, and thus may not be “delivered”.<sup>12</sup> Despite what Ḥanafī references state, this is in fact the opinion of Al-Shāfi‘ī. However, the Shāfi‘īs ruled that it is valid to establish a physical guaranty to deliver a person who owes money, or who must receive punishment for murder or for libel. However, they do not permit it for individuals who must receive punishments for transgressions against the Law, e.g. for drinking wine, committing adultery, theft, etc., since their school attempts to avoid exacting such punishments to the extent possible. In this regard, the Mālikīs and Ḥanbalīs ruled as invalid physical guaranties of delivering any individual who must receive punishment for any crime (be it murder, libel, theft, adultery, or any other).

The guarantor in physical guaranties is bound by deadlines that establish the right to deliver the object of guaranty. Thus, if a debt becomes due, the creditor demands delivery of the debtor, and the guarantor fails to deliver him, the judge may incarcerate the guarantor since he failed thus to satisfy his obligation. However, if the guarantor delivers the debtor to court, the market, or any place where the creditor can demand repayment, then the guarantor is exonerated of his responsibility to deliver him.

In this regard, the Mālikīs did not permit a married woman from acting as a physical guarantor, lest she be exposed to the humiliation of incarceration or being forced to travel in order to deliver the guaranteed individual. On the other hand, they permitted a type of physical guaranty called “guarantee of search”. This type of guaranty differs from standard physical guaranties by the fact that the guarantor may only be forced to pay compensation if he was negligent in searching for the object of

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<sup>12</sup>Al-Dardīr ((Mālikī)A, vol.3, p.344), ‘Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.291), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.203), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.342), ‘Ibn Qudāmāh (, vol.4, p.556), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.162), Al-Kāsānī ((Ḥanafī), vol.6, p.8), ‘Ibn Al-Humām ((Ḥanafī), vol.5, p.391), ‘Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.153), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.362), Ibn-Rushd Al-Qurṭubī ((Mālikī), vol.3, p.399).



guaranty. This limited guaranty may be initiated by saying “I guarantee finding him, on condition that I cannot be made financially liable if I cannot find him”.<sup>13</sup>

2. The majority of jurists ruled that object of financial guaranty must be possible to collect from the guarantor, otherwise the contract would not be of any benefit.

The Ḥanafīs, Mālikīs, and Ḥanbalīs<sup>14</sup> ruled according to the same principle that guaranties for receiving physical punishments are not valid, since a person cannot receive a punishment in lieu of another, and hence the guaranty is useless. This opinion was based on the *Ḥadīth* that the Prophet (pbuh) said: “there is no guaranty for a physical punishment” (*ḥadd*).<sup>15</sup> Moreover, they argued that guaranties are intended to ensure rights, while jurists always try to avoid exacting physical penalties by looking for sufficient grounds to doubt the need for applying them. Thus, certification and ensuring do not agree with the character of the exacting of physical punishments. Finally, since the right cannot be collected from the guarantor if the guaranteed individual is not delivered, such guaranties are not permitted.

However, the Ḥanafīs interpreted the impermissibility of guaranties for physical punishments to imply only that the guarantor may not be forced to provide the guarantee. However, if the accused individual guarantees delivery of himself for the physical punishments of crimes for which he was accused, the guaranty is valid. In this case, delivery of the guaranteed individual is possible for the accused guarantor who does so of his own volition.

However, ‘Abū Ḥanīfa ruled that if the accused individual does not volunteer himself, he may not be forced to provide a guarantor of his delivery. In this case, as we saw, guaranty does not suit the nature of physical punishments. Instead, the judge must in this case incarcerate the accused individual until such a time as the charges are proven and the punishment exacted (or he is set free if he is innocent). In contrast, ‘Abū Yūsuf and Muḥammad ruled that the accused can be forced to provide a guarantor of delivering him in the cases of physical punishments for murder or libel, since they affect the rights of other individuals.

In this regard, the Shāfi‘īs ruled as impermissible physical guaranties to

<sup>13</sup>Al-Dardīr ((Mālikī)B, vol.3, pp.430,433,451).

<sup>14</sup>Al-Kāsānī ((Ḥanafī), *ibid.*), Al-Dardīr ((Mālikī)A, vol.3, p.346), ‘Ibn Ruṣḥd Al-Ḥafīd ((Mālikī), vol.2, p.293), ‘Ibn Qudāmāh (, vol.4, p.557), ‘Ibn Al-Humām ((Ḥanafī), vol.5, p.399), *Majma‘ Al-Ḍamānāt* (p.272), ‘Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.157 onwards).

<sup>15</sup>Narrated in Al-Bayhaqī with a weak and denied (*munkar*) chain of narration of ‘Amr ibn Shu‘ayb on the authorities of his father and grandfather. It was also narrated by ‘Ibn ‘Udayy in *Al-Kāmil*, where also found fault in the chain of narrations that contained ‘Abū ‘Umar Al-Kalā‘ī whose *Ḥadīths* are not accepted. C.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.63), Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.59).



deliver individuals for physical penalties due to crimes that pertain to the rights of Allāh (e.g. drinking wine, adultery, and theft). In such cases, as we have seen, their school attempts to avoid exacting such penalties. However, they permitted physical guaranties to deliver individuals for physical punishments due to committing crimes against men only (e.g. libel), in which case guaranty is permitted in analogy to the case of liability for financial rights.<sup>16</sup>

For the Ḥanafīs, it follows from this general condition that it is valid to provide guaranty of delivering goods owed by another, without necessarily specifying the means of transporting such goods. In such cases the guarantor can in fact perform the obligation of delivering the objects. However, they ruled that it is not valid to guarantee that such goods will be delivered on a special vehicle, animal, etc. In the latter case, performing the guaranteed action may be made impossible if the means of transportation perishes.

3. A guaranteed financial debt must be a valid and binding liability. Such liabilities can only be dropped through repayment or exoneration. Thus, jurists ruled that it is not valid to guarantee the compensation for freeing a slave (*mukātab*) who is permitted to buy his freedom. This ruling follows from the fact that this compensation is not a binding debt (some called it a weak debt), since the slave can drop the debt by deciding not to exercise the option. Thus, certification of such a debt repayment is rendered meaningless.

They also ruled that guaranty is not permitted for non-debts such as the alimony of an ex wife before it is determined and agreed-upon. In this regard, the alimony only becomes a debt after such agreement is concluded.<sup>17</sup>

In this regard, Al-Baghdādī ruled that guaranty of alimony payments is permissible even though they can be dropped if the guarantor or ex-husband were to die (without payment or exoneration). The same applies to guaranties of specific future alimony payments, etc.<sup>18</sup>

### Guaranty of future liabilities

There is a consensus that guaranties of currently owed debts are valid if the debt is known. Moreover, there is a consensus that it is not permissible to guarantee debts prior to maturity if it is not certain that they will be binding in the future. However, the majority of jurists permit guaranties of debts prior to maturity if it is known that the debts will be binding in the future (e.g. promised reward or

<sup>16</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.203 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.343).

<sup>17</sup> Ibn ʿAbidīn ((Ḥanafī), vol.4, pp.262,274), Al-Dardīr ((Mālikī)A, vol.3, p.333), Al-Dardīr ((Mālikī)B, vol.3, pp.431-434), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.340), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.201), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.356).

<sup>18</sup> *Majmaʿ Al-Damānāt* (p.269).



*ji' alah*, or if a person says “deal with so and so, and I guarantee his liabilities to you”). This ruling follows from the ruling by most jurists that it is permissible to guarantee another person’s belongings before they are shipped.

In the case of promise of reward, two opinions were reported in the Shāfi‘ī school regarding guaranteeing such rewards before they are due. The more accepted opinion in their school renders such guaranties impermissible, based on the view that liabilities that are not due may not be guaranteed. This general rule is applied by most Shāfi‘īs regardless of whether the reason for establishing the debt is established (e.g. future alimony payments), or not yet established (e.g. debts originating from a future loan). In this regard, they argue that guaranty ensures a legal right, and hence may not precede it in analogy to legal testimony. Thus, they permit guaranties of existing due liabilities, but not for known future liabilities prior to becoming due.

### Guaranty of an unknown liability

The majority of jurists<sup>19</sup> do not require that a guaranteed debt be specified, or known in amount and characteristics. Thus, they permit guaranteeing known amounts (e.g. “I guarantee his debt of \$1000”) as well as unknown amounts (e.g. “I guarantee whatever you owe him” or “I guarantee whatever you owe based on this sale”). This opinion is based on the view that guaranty is a voluntary contribution contract meant to facilitate transactions. Thus, unlike sales contracts, guaranty contracts may include ignorance.

In this regard, there is a consensus among jurists that guarantees of the price paid in a sale are valid.<sup>20</sup>

The Ḥanafīs also permitted the guaranty if one person tells another to take a particular road, stipulating that he guarantees his property against theft. In this case, the guaranteed property is unknown, since neither party knows how much would be stolen, and the guarantor does not know how much property the guaranteed person will carry with him. The same also applies to the case of guaranteeing a person’s wealth against usurpation by a named individual or group.<sup>21</sup>

In contrast, the latter Shāfi‘ī juristic system stipulates that a guaranteed object must be known in terms of genus, amount, characteristics, and specification. This opinion is based on the view that a guaranty is a contract that establishes

<sup>19</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.9), ‘Ibn Al-Humām ((Ḥanafī), vol.5, p.402 onwards), ‘Ibn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, p.294), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.200), ‘Ibn Qudāmah (, vol.4, pp.536-539), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.50), ‘Ibn ‘Abidīn ((Ḥanafī), vol.4, p.275), *Majma‘ Al-Ḍamānāt* (ibid.).

<sup>20</sup>This is the guarantee provided when dealing with an unknown seller, where the buyer fears that he may pay the price and receive nothing in return, c.f. Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī)). Thus, Professor Al-Zarqā’ defines *al-kafālah bi-l-darak* in his *Al-Madkhal Al-Fiqhī Al-‘Am* (p.271) as the guarantee of the sold object that may not be collected due to a known source of risk. Some Ḥanafīs ruled that this type of guaranty is permissible, and defined it as guaranteeing delivery of the price when the object of sale is due. In this case, they ruled that the guarantor is not liable until delivery is due from either the buyer or the seller, c.f. *Majma‘ Al-Ḍamānāt* (p.275).

<sup>21</sup>*Majma‘ Al-Ḍamānāt* (p.270).



property as a liability on a human being, and thus it is sufficiently similar to sales to warrant the exclusion of any type of ignorance regarding the established liability. On the other hand, they permitted guaranty of the paid price for a buyer, based on the need for such guaranties in everyday transactions.<sup>22</sup>

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<sup>22</sup>Al-Ramlī ((Shāfiʿī), vol.3, p.403), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.201), 'Ibn Qudāmah (, vol.1, pp.340-342).



## Chapter 59

# Contract Status

The legal status of a guaranty contract may take one of two forms:<sup>1</sup>

### 59.1 Seeking compensation from the guarantor

In this case, the compensation that is sought depends on the nature of the object of guaranty. Thus, if the guaranteed item was a debt, then if there is one guarantor, full compensation for the guaranteed debt is sought from him. If the guarantors are many, then each of them would be asked to pay an equal share of the guaranteed amount, provided that none of them had in turn guaranteed the other. In this case, they are equal in the guaranty responsibilities, and since the guaranteed item is divisible, their liability is divided equally. The guarantor in this case, after having fulfilled his obligation, cannot seek compensation from another guarantor, but should rather seek compensation from the guaranteed party.

On the other hand, if the object of guaranty was a person, then the guarantor is required himself to bring the guaranteed person, provided that he is not absent. In the latter case, the guarantor is given a reasonable waiting period to bring back the guaranteed person. If the guarantor does not bring the guaranteed person within the specified period, and if he cannot prove his inability to do so due to reasons beyond his ability, then the judge may imprison him until he can provide such proof. If the guarantor later provides the judge with a material proof, witnesses, or other proof of his inability to bring the guaranteed person, then the judge must release him and postpones the ruling until such a time that he has the ability of bringing the guaranteed. This ruling follows in this case by comparing the guarantor's situation with that of a bankrupt person who had guaranteed a debt. However, even though the judge may release the

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.10 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, pp.391,403), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.162), 'Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.262), 'Ibn Juzayy ((Mālikī), p.325), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.208), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.352), 'Ibn Qudāmah (, vol.5, p.547).



guarantor in this case, the creditors may continue to monitor the guarantor's behavior, and the judge may not issue an injunction against further demands of delivery. However, the creditors have no right to prevent him from his normal daily activities of working, earning an income, etc. All the preceding are the views of the Ḥanafīs.

The Shāfi'īs, on the other hand, ruled that the guarantor may be required to deliver the guaranteed person provided that he knows his whereabouts. However, if the guarantor is ignorant of the guaranteed person's whereabouts, they ruled that he is not obliged to deliver him. In the case where he is obliged to deliver the guaranteed person, he is thus allowed enough time for the trip back and forth. If that period passes, but he still fails to deliver the guaranteed person, then he must be imprisoned until such a time that the guaranteed person cannot be delivered due to his death, moving to an unknown location, or moving to a location where others protect him from the guarantor's pursuit.<sup>2</sup>

Finally, if the guaranteed item was a non-fungible property, the guarantor is required to deliver the guaranteed item as long as it continues to exist intact. If the guaranteed item had perished, then the guarantor is required to deliver the equivalent of its value.

### 59.1.1 Absolution of guaranteed debtors

- The majority of jurists ruled that the guaranty contract does not absolve the principal (guaranteed party) from his debt.<sup>3</sup> Thus, the creditor is given the option of demanding payment from the principal or from the guarantor, unless absolution of the principal was stipulated as a condition of the guaranty. In the latter case, the guaranty contract is in fact a transfer of liability (*hawālah*).<sup>4</sup>
- However, the Shāfi'īs did not allow the stipulation of such a condition, since they viewed it as a condition that is not in accordance with the nature of the guaranty contract.
- Imām Mālik in one of two stated opinions ruled that a creditor may not seek compensation from the guarantor unless he fails to seek repayment from principal debtor. This opinion is based on his view that guaranty is a legal means of ensuring repayment of a debt, and thus repayment may not be demanded of the guarantor unless it is not possible to demand repayment from the principal, in analogy to the pawning contract [wherein the pawned object is forfeited only if the debt cannot be collected from the debtor].
- On the other hand, 'Ibn 'Abī Laylā, 'Ibn Shubrumah, 'Abū Thawr, 'Ibn Sīrīn, the Zāhirīs, and the 'Imāmīs ruled that a guaranty contract absolves

<sup>2</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.205).

<sup>3</sup> Al-Kāsānī ((Ḥanafī), ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.208), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.292), 'Ibn Qudāmāh (, vol.4, p.546-7), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.390).

<sup>4</sup> Al-Sarakḥṣī (1st edition (Ḥanafī), vol.20, p.46).



the principal debtor of his debt. Thus, they ruled that the debt is transferred to the juristic personality (*dhimmah*) of the guarantor. It follows in their opinion that the debtor may not seek repayment from the principal debtor, in analogy to the transfer of liability case (*hawālah*). They provided for this opinion a proof based on the story that 'Abū Qatādah (mAbpwh) guaranteed a dead person for his two Dinār debt, after which the Prophet (pbuh) said to him: "May Allāh reward you well, and may he release your pawned objects as you released your brother's pawned objects".<sup>5</sup> They thus infer from this story that the principal whose debt was guaranteed was thus absolved of his debt.

The opinion of the majority of jurists is the most valid of those mentioned, since guaranty is essentially the conjunction of one person's juristic personality (*dhimmah*) to another; either for the purpose of demanding repayment of the debt or for the rights associated with the debt (as we have seen in the previous list of opinions). In this regard, absolution of the debtor would not be in accordance with the conjoining of liabilities. Moreover, were the guaranty contract to absolve the principal debtor of his debt, it would in effect be the same as a transfer of liability (*hawālah*), but of course those are two different contracts with two different names.

Moreover, the majority opinion was supported by the Ḥadīth: "The soul of a believer is tied to his debt until it is repaid".<sup>6</sup> They also used as proof his (pbuh) statement in the story of 'Abū Qatādah, when he learned that his debts were repaid: "now his grave may cool down".<sup>7</sup> In this regard, the Prophet (pbuh) prayed for the deceased after his debts were guaranteed since the debt was now payable; whereas his (pbuh) refusal to pray initially followed from his objection to praying for a debtor whose debts seemed un-payable. As for his saying (pbuh) "May Allāh release your pawned ...", it refers to the fact that the Prophet (pbuh) would not have prayed for him initially, but that condition was resolved after the guaranty.<sup>8</sup>

In this regard, one must distinguish between the cases of guaranty and the cases of a usurper and the one who usurps what the usurper had taken. In the latter case, the owner of the usurped property may place the responsibility for guaranteeing his property on either party (but not both). The difference between the two cases is thus: in the case of usurped property, by designating a specific party for guaranty, that usurper may in fact gain ownership of the

<sup>5</sup>We have mentioned previously that the narration of this Ḥadīth by °Alī is weak, as stipulated by 'Ibn Ḥajar. This narration of 'Abū Qatādah is of greater validity.

<sup>6</sup>Narrated by Aḥmad in his *Musnad*, and also narrated by Al-Tirmidhī, 'Ibn Mājah, and Al-Ḥākim on the authority of 'Abū Hurayrah. A similar Ḥadīth was narrated by Al-Ṭabarānī in *Al-Awsaṭ* on the authority of Al-Barā' ibn °Azib that the Prophet (pbuh) said: "the debtor is a hostage to his debt, complaining to Allāh of his solitude". However, the latter's chain of narration includes Mubārak ibn Faḍālah, and while °Affān and 'Ibn Ḥibbān authenticated it, some others rendered it weak, c.f. Al-Suyūṭī (a, vol.2, p.188), Al-Haythamī (, vol.4, p.129).

<sup>7</sup>This is established in the narration on the authority of Jābir ibn °abd-Allāh reported in 'Aḥmad, Al-Dāraqutnī, and Al-Ḥākim as "now you have cooled down his skin", and in another "his tomb"; c.f. 'Ibn Ḥajar (, p.251), Al-Shawkānī (, vol.5, p.239).

<sup>8</sup>'Ibn Al-Humām ((Ḥanafī), vol.5, p.390), and *ibid*.



usurped item if a judge were to rule against the initial owner. However, in the case of guaranty, the guarantor may never imply ownership of the guaranteed object, since guaranty is essentially a conjoining of liabilities and not a transfer of ownership, unless repayment is in fact effected, even if a judge were to rule.

## 59.2 Seeking compensation from the principal debtor

In all types of guaranty, the guarantor has the right to demand compensation from the principal debtor, provided that the latter had requested the guaranty. For instance, if the object of guaranty was a debt, and if the guarantor is asked to repay the debt, then the guarantor may seek relief from the guaranteed party. Moreover, if the guarantor were to be imprisoned, he may seek the alternative of imprisoning the guaranteed party who gave him the responsibility for his debt.

On the other hand, if the guaranty was not requested by the guaranteed party, then the guarantor has no right to seek compensation from, or imprisonment of, the principal debtor. Moreover, if the guarantor voluntarily provided guaranty to the principal debtor, whether or not the guaranteed party requested it, with no intention of ever seeking compensation from him, then the debtor is thus absolved of his debt.

In the cases where the guarantor may seek compensation from the guaranteed party, he may only do so after he has repaid the debt, even if the guaranteed party had requested the guaranty. This follows since the right to seek compensation is only established through lending and ownership transfer, both of which are only established in our case through repayment of the debt. This ruling is in contrast to the case of a buying agent, who may seek to collect the price from the principal prior to paying it out of his own money. In the buying agent case, the price is compensation for the object of sale, which is being transferred to the principal and not to the agent. Thus, payment of the price in this case is the responsibility of the principal alone, and the agent may demand to collect it. In the case of guaranty, the guarantor's repayment of the principal debtor's debt is considered a loan to the principal, for which the guarantor may seek compensation, but only after the loan comes into existence through repayment of the debt.



## Chapter 60

# Guaranty Termination

In what follows, I shall list the means by which a guaranty contract may be terminated briefly according to the type of guaranty.

### 60.1 Guaranteed property

If the object of guaranty is property, then it may be terminated in one of two ways:<sup>1</sup>

#### 60.1.1 Debt repayment

If the debt is repaid to the creditor in one way or another, either by the principal or by his guarantor, the guaranty contract is thus terminated. In this case, the right to demand repayment was satisfied, and since the objective of the guaranty contract was to ensure such repayment, the legal status of the contract is terminated.

Also, if the creditor were to grant the property as a gift of charitable payment to the principal debtor or his guarantor, then the situation is tantamount to repayment of the debt, and the contract is thus terminated.

The contract is also terminated if the creditor dies and either the principal debtor or his guarantor inherit his estate. In this regard, if the inheritor is the guarantor, then he thus becomes the owner of his own liability for the principal's debt through the inheritance. In this case, the guarantor may demand compensation from the principal in analogy to the case where his own liability is satisfied by repayment of the debt. On the other hand, if principal debtor was the inheritor, then the guarantor is absolved of his liability, as if he had in fact repaid the debt.

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.11), Al-Taḥāwī ((Ḥanafī), p.104), 'Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.285), Majmaʿ Al-Ḍamānāt (p.274), 'Ibn Qudāmah (, vol.4, p.546 onwards).



### 60.1.2 Absolution

If the creditor absolves either the guarantor or the principal debtor of the debt, the guaranty contract is thus terminated. However, if the guarantor is the one absolved of his liability, the principal debtor is not thus absolved; but if the principal debtor is absolved, then so is the guarantor. This follows from the fact that the debt is initially a liability on the principal and not on the guarantor.

Thus, the principal's liability is like a root, and the guarantor's liability is like a branch; whereby absolution of the principal drops the branch together with its root. On the other hand, absolution of the guarantor only absolves him from the responsibility to repay the debt, but does not imply that the creditor is absolved of his debt. In this regard, dropping a branch does not imply dropping the root.

However, the language of absolution is crucial in determining its extent. Thus, if the creditor were to say to the guarantor or the principal debtor: "you are absolved of what you owe me", the status of the debt is equivalent to that of repayment. Thus, neither the guarantor nor the principal would owe the creditor anything after such absolution. However, if the guaranty was requested by the principal debtor, then the guarantor may still seek compensation from him.

On the other hand, if the creditor does not mention himself (as in "what you owe me"), and only says to the guarantor or principal: "you are absolved of what you owe", then 'Abū Yūsuf ruled that the situation is identical to the one in the previous paragraph. In this regard, he argued that this absolution is still equivalent to receipt, since it is customarily assumed that absolution is given only for debts owed to oneself.

In contrast, Muḥammad ruled in this case that the guarantor is absolved, but not the principal debtor. In this regard, he argued that absolution maybe established either through repayment, or without. Thus, without stating explicitly that they are absolved of "what they owe him", which would imply repayment, the principal is not thus absolved of his debt.

### 60.1.3 Miscellaneous

In addition to the two main means of termination listed above, there are a few other means by which a guaranty of property debt can be terminated:

- If either the guarantor or the principal debtor were to transfer liability for the debt, through a *hawālah*, to a third party who accepts the transfer, then both parties are absolved of the debt and the responsibility to repay if requested. Therefore, the guaranty is terminated in this case.
- If the guarantor reaches a reconciliation with the creditor for part of the debt, both the guarantor and the creditors are absolved in two cases:
  - If the agreement stipulates that both the guarantor and the principal are absolved for the rest of the principal's debt.



- If the agreement simply stipulates that “we have reached a reconciliation for so-much”, without mentioning absolution.

However, if the guarantor only mentions himself: “on condition that I am absolved of the remainder of the debt”, then only he is absolved and the principal remains liable for the remainder.<sup>2</sup>

- A guaranty may also be terminated through voiding of the instigating factor for the guaranteed debt. For instance, if the guaranteed debt originated as the price or the object of a sale, then the guaranty is terminated if the sale contract is voided. In this case, the guaranteed debt no longer exists, and thus the principal has no rights over the guarantor.

## 60.2 Guaranteed persons

The guaranty of a person can be terminated in three ways:<sup>3</sup>

### 60.2.1 Delivering the guaranteed person

If the guarantor delivers<sup>4</sup> the guaranteed person to a location that makes it possible to bring him to a courthouse (e.g. to a city), the guaranty is terminated. In this case, the objective of the guaranty, which is to bring the guaranteed person to the judge for legal proceedings, is attained, the guaranty is terminated. In this regard, even if the guarantor were to deliver the guaranteed person to a judge, while the contract stipulated that he should deliver him to the ruler, he would still be absolved of his responsibility.

However, if the guarantor were to deliver the guaranteed person to a desert or far away place, he is not absolved, since the objective of bringing him to court is not thus attained. The same is true if he is delivered in a small town with no judicial facilities and/or personnel who can begin legal proceedings.

’Abū Ḥanīfa ruled that the guarantor is absolved even if the guaranty contract stipulated that he must deliver the guaranteed person to a specific city, but he delivered him to another. He based his ruling on the fact that trying the guaranteed person in the specified city was still possible after his delivery to the other city. However, ’Abū Yūsuf and Muḥammad ruled that he is not absolved thus, unless and until he completes the delivery to the specified location. They based their ruling on the view that the stipulated condition may be useful, e.g. if eye witnesses can only be found in the specified city.

<sup>2</sup> Al-Sarakhsī (1st edition (Ḥanafī), vol.20, pp.58,91), Al-Kāsānī ((Ḥanafī), ibid, p.12), ’Ibn Al-Humām ((Ḥanafī), vol.5,p.412), Al-Ṭaḥāwī ((Ḥanafī), p.105), Majma<sup>c</sup> Al-Ḍamānāt (p.274).

<sup>3</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.12 onwards), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, pp. 166,175), ’Ibn Al-Humām ((Ḥanafī), vol.5, p.393 onwards, 411), ’Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.267 onwards), Majma<sup>c</sup> Al-Ḍamānāt (pp.277,274), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.153 onwards).

<sup>4</sup> Deliver is attained by the removal of all impediments between the guaranteed person and the one to whom the guarantee is given



### 60.2.2 Absolution

If the party to whom guaranty was provided absolves the guarantor, then the guaranty is terminated. In this regard, the essence of a guaranty contract is the right to demand delivery, which is thus dropped through absolution. However, in this case, the principal guaranteed person is not absolved unless the absolution is explicitly issued for both the guarantor and the guaranteed person.

### 60.2.3 Death of the guaranteed person

If the guaranteed person dies, then the guarantor is absolved of the contract, since delivery becomes impossible. Similarly, if the guarantor were to die, he would thus be unable to perform the required delivery and his estate cannot be used to deliver the object of guaranty (in contrast to the case of guaranteed property, where it may).

However, the death of the party to whom guaranty was given does not terminate the guaranty of a person or property, since the guarantor is still capable of performing his obligations under the contract, and the deceased party's heir or guardian may continue to demand delivery.

## 60.3 Guaranteed non-fungibles

Guaranties of non-fungibles, the satisfaction of which requires delivery of the object itself, may be terminated in one of two ways:<sup>5</sup>

1. Delivery of the guaranteed item if it still exists, or delivery of a similar item or the value of the item if it had perished.
2. Absolution of the guarantor or the principal debtor. In this regard, guaranty is a right for the party to whom it was given, and he can thus drop it in analogy to debts.

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<sup>5</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.13).



## Chapter 61

# Seeking compensation from the principal

In this chapter, we discuss the cases wherein the guarantor may seek compensation from the principal debtor. This issue will be discussed in two sections: (1) the conditions for seeking compensation, and (2) when to seek compensation, and what to seek compensation for.

### 61.1 Conditions for seeking compensation

The conditions under which the guarantor may seek compensation from the principal debtor are the following:<sup>1</sup>

1. The Ḥanafīs and Shāfiʿīs ruled that for the guarantor to seek compensation from the principal, the guaranty must be initiated by the principal's request or permission. Otherwise, the guarantor is considered to be offering his guaranty as a gift. As proof for their ruling, they referred to the Prophet's (pbuh) praying for the deceased person once 'Abū Qatādah offered his guaranty.<sup>2</sup>

On the other hand, 'Imām Mālik and 'Imām 'Aḥmad (in one of his reported opinions) did not stipulate the principal's permission as a condition for the guarantor's right to seek compensation from him. Their argument was based on the view expressed by 'Ibn Qudāmah that paying compensation to the guarantor is required to absolve the principal from a binding debt. In this regard, the guarantor's payment of the principal debtor's debt is considered similar to the judge's payment of the debt when the debtor refuses to pay, after which he may seek compensation. As for the

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), ibid., p.13 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.408 onwards), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.178).

<sup>2</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.341), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), ol.2, p.209).



story of 'Abū Qatādah, they argued that he had in fact voluntarily given his guaranty and repayment as charity to clear the liability of the deceased person, so that the Prophet (pbuh) would pray for him. In this regard, he was fully aware that he will not be compensated by the deceased party or his estate or heirs. Thus, he was a charitable guarantor, who would never demand compensation for his charity.<sup>3</sup>

2. The guaranty must be issued by consent of an individual who is qualified to acknowledge indebtedness. Thus, if the principal debtor is a young boy who is not eligible to perform financial transactions, the guarantor of his debts may not seek compensation from him. In this regard, the relationship between the guarantor who repays the principal's debt and the principal whose debt was paid is a relationship of borrowing, which is not allowed for the young boy.
3. The principal must associate himself with the initial guarantee of the debt (e.g. by saying "guarantee my debt"). In this regard, unless the principal associates himself to the guarantee, the relationship of borrowing from the guarantor would not be established. In fact, the request for guaranty is a form of requesting to borrow on part of the principal, and agency to pay the creditor on behalf of the principal, which becomes a loan to the principal once the payment is made. For the creditor, his acceptance of the guaranty is an acceptance to take what is owed to him by the principal from the guarantor.
4. In order for the guarantor to seek compensation from the principal for his repayment to the creditor, he must not be indebted to the principal for an equal amount, otherwise the two debts would cancel one another (*muqāṣṣah*).

We now recap some of the previously stated rulings pertaining to seeking compensation from the principal:

- If the creditor gives the debt as a gift to the guarantor, he may still seek compensation from the principal, since the gift is equivalent to repayment of the debt.
- If the creditor gives the debt as a gift to the principal debtor, then the guarantor is absolved of his responsibility, since the gift is thus equivalent to repayment of the debt by the principal.
- If the creditor dies and is inherited by the guarantor, then he may still seek compensation from the principal.
- If the creditor dies and is inherited by the principal debtor, the latter is thus absolved of the debt, and the guarantor is absolved of his responsibility.

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<sup>3</sup>Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.294), 'Ibn Qudāmah (, vol.4, pp.449 onwards), 'Ibn Juzayy ((Mālikī), p.325).



- If the creditor absolves the guarantor, he may not seek compensation from the principal. In this case, absolution only drops the creditor's right to collect from the guarantor, but does not drop the debt of the principal.
- The guarantor may absolve the principal of whatever he guaranteed for him with his permission or as a gift. In such a case, the guarantor may not seek compensation from the principal after repayment of the debt.

In the case of absolution, we review the previously stated opinions pertaining to the language used by the creditor:

- If the creditor says to the guarantor: “you are absolved of the money you owe me”, the Ḥanafīs agree that the guarantor may still seek compensation from the principal. In this case, they ruled that absolution is tantamount to receipt, since the word “absolve” is often used after the collection of debts.
- However, if the creditor says to the guarantor: “you are absolved of the money”, then the Ḥanafī jurists differ in opinion.

ʿAbū Yūsuf ruled that this language implies receipt just like in the previous case where the creditor mentioned himself. In both cases, he argues that the creditor takes an action of absolving the guarantor himself, whether or not that is explicitly stated.

Muḥammad, on the other hand, ruled that the language in the second case only ascertains that the guarantor is absolved of his responsibility to pay, but is not sufficiently strong to indicate receipt (which is thus doubtful). Thus, since there is doubt associated with the language as it pertains to debt repayment, he ruled that the debt is not considered repaid, and thus the guarantor may not seek compensation from the principal. This, in fact, is the most widely supported opinion among the Ḥanafīs.

- If the creditor simply says “I have absolved you” to the guarantor, absolution is thus restricted to the guarantor alone. Thus, the Ḥanafīs agree in this case that its effect does not extend to dropping the debt established on the principal, and thus the guarantor may not seek compensation. The difference for ʿAbū Yūsuf between this case and the case of “you are absolved of the money” is that being absolved of the debt through absolution is not effected by the guarantor, but rather by the creditor. Thus, the action may not be attributed to the guarantor.<sup>4</sup>

In summary: the dominant Ḥanafī opinion is that the guarantor may not seek compensation from the principal if the creditor said “you are absolved” without saying “towards me” or “I absolve you”. In such cases where the creditor does not mention himself, he is thus ruled only to absolve the guarantor, but not to have declared receipt of his money.

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<sup>4</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.93), ʿIbn Al-Humām ((Ḥanafī), vol.5, p.413), ʿIbn ʿĀbidīn ((Ḥanafī), vol.4, p.287 onwards).



### Multiple guarantors

Consider the case where two men guarantee a third man's debt (say of \$1000), without either of the guarantors guaranteeing the other. In this case, if one of the guarantors repays the debt, then he may not seek compensation from the other guarantor, but may only seek compensation from the principal debtor whose debt he guaranteed with his consent.

Now, consider the case where one of the guarantors guarantees the other one, and then repays the principal's debt. In this case, the paying guarantor may specify whether his payment was a fulfillment of his own guaranty or that of the other guarantor. This follows from the fact that the creditor thus demands his payment of the money in two capacities: (i) one as a personal liability as guarantor of the principal, and the other (ii) as guarantor of the second guarantor. In this regard, neither of the two obligations has a higher priority than the other, and the paying guarantor is given the option of designating the payment in either way.

Finally, consider the case where each of the two guarantors guarantees the other. Then, whatever one of them pays, he is considered to be paying his own liability up to half of the overall debt (\$500 in our example). Thus, up to that amount, the paying guarantor may not claim to be paying on behalf of the other one. If the paying guarantor paid more than half the debt (i.e. more than \$500 in the example) then he has the option whether to demand compensation for the excess over half from the other guarantor or from the principal.

In fact, this rule applies in other contexts as well. For instance, if two men were to buy an item for \$1000, each guaranteeing the other's share of liability for the price, then whatever one pays up to \$500 is considered payment on behalf of himself. He may thus seek compensation from the other buyer only for the amount paid over and above the first \$500. Similarly, if two unlimited partners part with a mutual liability, then the creditor may demand repayment from either one. In this case, the paying debtor may only seek compensation from the other only for any payments over and above half the debt.<sup>5</sup>

## 61.2 Permissible sought compensation

The Ḥanafī rule that the guarantor may seek compensation from the principal debtor for what he guaranteed, not for what he actually paid. In this regard, what was guaranteed was the property established as a liability on the principal, and that is what he should seek compensation for. Thus, if the guaranteed object was of high quality, but the guarantor paid the debt with a lower quality item, the guarantor may still demand compensation with the higher quality item. Similarly, if he guaranteed a monetary debt, but repaid it in kind, he still demands monetary compensation equivalent to what he guaranteed, not to what he used as payment.

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<sup>5</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.14 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.437 onwards), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.34), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.298).



This is in contrast to the agent for debt repayment, who may only seek compensation from the principal in the form and amount that he paid. In this case, the agent is viewed by payment not to have transferred the debt to himself, but simply as lending the principal the amount that he paid, and thus may only seek compensation for what he lent him.

In the case of reconciliation for part of the debt, the guarantor may only seek compensation up to the amount at which the reconciliation took place, not for the full amount of the debt. This follows from the fact that by paying part of the debt, the guarantor would not have owned the full amount of the debt established as a liability on the principal. Thus, reconciliation at a lower value than the full debt may not be considered a full transfer of credit rights, since it can easily lead to *ribā*.<sup>6</sup>

In general, the Mālikīs and most of the Shāfi'īs ruled that the guarantor may only seek compensation from the principal for what he in fact had paid. In the cases of reconciliation or forgiveness of part of the debt, the Shāfi'īs rule that the guarantor may only seek compensation for what he paid, and the Mālikīs rule that he should seek compensation for the lesser of the debt and the amount paid at reconciliation.<sup>7</sup>

The Ḥanbalīs ruled generally that the guarantor should only pay the lesser of what he pays and the amount of the principal's debt. In this regard, they argued that if he paid more than the principal's debt, which is not a requirement, he is deemed to have made this extra payment as a gift, and may not seek compensation thereof. On the other hand, if the guarantor paid less than the principal's debt, then he may only seek compensation for what he paid, in accordance with the Mālikī and Shāfi'ī schools.<sup>8</sup>

## 61.3 Time to seek compensation

The guarantor may not seek compensation from the principal prior to paying his debt on his behalf. In this regard, the guarantor does not own the necessary credit to demand compensation until he actually makes the payment on his behalf. This is again in contrast to the buying agent, who takes the legal status of the seller, and may thus seek payment of the price prior to delivery.

However, if the guarantor receives demands to pay the amount he guaranteed, he may thus issue demands to the principal. Moreover, if the guarantor is incarcerated because of the debt he guaranteed, he may incarcerate the principal until he releases him by repayment. In such cases, the guarantor is only deserving of such hardships on account of the principal, and thus the principal may be punished in a similar manner.<sup>9</sup>

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<sup>6</sup> Al-Kāsānī ((Ḥanafī), ibid., p.15).

<sup>7</sup> Al-Dardīr ((Mālikī)A, vol.3, p.346), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.209 onwards).

<sup>8</sup> Ibn Qudāmah (, vol.4, p.551).

<sup>9</sup> Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.157).



## Chapter 62

# Contemporary Guaranty for a Fee

Guaranty is fundamentally a voluntary charitable contract, for which the guarantor should be rewarded for his good actions. In this contract, the guarantor may seek compensation from the principal for the amount he paid on his behalf to the party given his guarantee. In this regard, it is best to avoid all suspicions by concluding this contract of guaranty without any compensation (over and above what the guarantor actually pays on behalf of the principal). On the other hand, it is permissible for the principal to give part of the property as a gift to the guarantor, as a way of returning one favor for another.

However, if the guarantor were to demand a fee for providing guaranty, and if the principal is unable to find a guarantor who would not demand such a fee, then he may pay the fee to meet a necessity. Such necessity does exist since guaranties are often required for travel to study or earn a living, to postpone military service, etc. The permissibility of paying such a fee is based on the jurists' permission to pay fees for other goodly acts such as teaching the Qur'ān, and other religious acts. They have also permitted paying some bribes in order to find the truth and remove injustice, as well as paying money to enemies to protect the people from their danger. In this regard, the principal for whom the guaranty is effected benefits from having such a guaranty, and may thus pay a fee for it; and guaranteeing agencies often have clerical costs for providing guaranty, and thus may collect fees accordingly. However, since the essence of guaranty is charity, it is still important not to charge excessive fees.

### Letters of Credit

Letters of credit are customarily issued by banks at the request of an importer to satisfy the requirements of a corresponding exporter. A bank would issue such a letter as a guarantee to pay the foreign exporter for the goods that its client (the domestic importer) wishes to buy. Upon providing proof of delivery



of the goods as stipulated in the contract, the bank would thus pay the foreign exporter.

In a fully covered letter of credit, the bank acts mainly as an agent of the principal importer, even as he simultaneously acts as his guarantor. In this regard, the bank may collect a fee or commission for its agency, but not for its guaranty.

However, if the account is uncovered or partially covered by the importer's funds, the bank acts primarily as a guarantor. Thus, if the bank collects a commission in this case only in compensation for its guaranty, and not in compensation for its actual work, then it would have taken a forbidden fee for the guaranty itself.<sup>1</sup>

In the cases of fully or partially covered letters of credit, we have argued that the bank may collect fees for its agency efforts, but not for its guaranty services. In this regard, the fees for agency must be commensurate with the actual clerical costs associated with the issuance of the letter of credit and other banking operations associated with it, as stipulated in the first conference for Islamic Banks held in Dubai.

Banking costs include the ones associated with information collection, cost-benefit analyses for the relevant projects, the costs of collection and payment of relevant amounts, etc. In the case of uncovered guaranty, the bank may still collect fees in compensation for those costs.

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<sup>1</sup>c.f. *Al-Kafālah* by Dr. <sup>c</sup>Alī Al-Sālūs (pp.159-60).



## Chapter 63

# Applications to Modern Guaranties

### 63.1 Major forms of commercial guaranties

Jurists have long known a number of commercial guaranties that are similar in essence to the modern bank guaranties. The most important of those guaranty forms are the following:

1. *Ḍamān Al-Darak* or *Ḍamān Al-ʿuhdah*, which constitutes guaranty of the price to a seller and guaranty of an object of sale to the buyer.
2. Market guarantees, in which the guarantor guarantees all of a merchant's debts, as well as all non-fungibles in his possession of guaranty. This includes guaranties of debts prior to maturity as well as guaranties of unknown objects. The majority of jurists permitted this type of guaranty, but Al-Shāfiʿī rendered it invalid.<sup>1</sup> The majority's proof for permissibility of this contract is the verse "For him who produces it is the reward of a camel load: I will be bound by it" [12:72]. Thus, the author of *Al-ʿuqūd Al-Durriyah fī Tanqīḥ Al-Fatāwā Al-Ḥāmidīyyah* (vol.1, p.285) has rendered this guaranty permissible.

Thus, the *Majallat Al-ʾAḥkām Al-Sharʿiyyah* (#1094) stated: "Market guarantees are permissible. For instance, if a guarantor guarantees what is owed a merchant, what he owes to other merchants, or whatever non-fungibles he holds in a possession of guaranty, the guaranty contract is valid".

3. Guaranties against inaccurate tools of measurement of weight, volume, or size.

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<sup>1</sup>c.f. *Fatāwā Ibn Taymiyyah* (vol.29, p.549).



Thus, the *Majallat Al-’Aḥkām Al-Shar’iyyah* (item #1091) stated: “It is permissible to guarantee the buyer against diminution of the sold amount in weight, volume, or length. Thus, if the buyer suspects that the bought goods are less in weight, volume, or length, than specified, it is permissible for a third party to guarantee the goods against being less. In this case, the buyer may return the goods if he finds that they are less than advertised, and his statement is accepted if backed by his oath”.

Those three types of guaranty, as mentioned in jurisprudence, constitute pure guaranties. In other words, they are charitable contracts for which no fees are collected. This is in contrast to the *ribawī* banking practices of today.

## 63.2 Letters of credit

A letter of credit is issued by a bank on behalf of an importer guaranteeing a foreign exporter that he will receive the promised price upon providing documentation to prove delivery of the goods he stipulated to export to the country.<sup>2</sup>

In this case, if the guaranty is fully covered by the customer, the bank is acting purely as an agent, and may thus collect a fee for its agency. On the other hand, if the guaranty is completely uncovered, then the bank is only a guarantor, and thus may not collect fees for guaranty, but only for clerical and administrative costs. If the guaranty is partially covered, then the bank is viewed as a partner in profits and losses with the customer for a given percentage (say 2%), and the contract is not a pure guaranty.

## 63.3 Commercial insurance

It is sometimes common to give commercial insurance with fixed premiums the name “guaranty” (e.g. The Syrian Ḍamān Corporation) to confuse people between this forbidden practice and the permissible *kafālah*. Indeed, it may even be thus included under the headings of guaranties of unknown items and guaranties of debts prior to their maturity.

Legally, commercial insurance is a contract according to which the insurance company is required to pay to the policy holder a lump-sum of money or a periodic payment, in case the events stipulated in the contract take place. In return, the policy holder pays a regular premium to the insurance company.

It is clear that this is a probabilistic commutative financial contract, wherein the compensation is not a charitable contribution by the insurance company. Such probabilistic contracts fall under the category of *gharar* contracts, since the amounts to be paid and received by each party are unknown at the inception of the contract. For instance, the insured party may have an accident after paying only one premium payment, or at the other extreme, he may pay all the premiums for the life of the policy without incurring a single accident.<sup>3</sup>

<sup>2</sup> *Al-Kafālah fī Ḍaw’ Al-Sharī’ah Al-’Islāmīyyah* by Dr. °Alī Al-Sālūs (p.159).

<sup>3</sup> *Al-Gharar wa ’Atharuhu fī al-’uqūd* (pp.639-663).



Thus described, this contract is impermissible due to containing elements of the forbidden *gharar* and *ribā*:

- The element of *gharar* is clear in this probabilistic contract, in which the object of the contract may and may not exist. In this regard, it is well established that the “Prophet (pbuh) forbade the *gharar* sales”.<sup>4</sup> Moreover, all commutative financial contracts are judged by analogy to sales in matters of *gharar*, which thus renders them invalid. It is thus that legal scholars have classified insurance under the heading of “*gharar* contracts”, since uncertainty is an integral part of the contract. Moreover, the amount of uncertainty in insurance companies is substantial, since it is the very cause for writing the contract, and the amount of uncertainty does not depend upon the actions of the contracting parties.

At the inception of the insurance contract, neither party knows how much they will pay or receive. In this regard, even though the insurance company may be able to know with very high probability how much it will pay and receive from the large collection of underwritten contracts, the uncertainty remains substantial for each insured party. Moreover, it is not valid to argue that what the insured party is getting is “insurance” or “safety” in return for the premia he pays, since safety is not the object of the contract, but rather its instigating factor. In fact, if we render “insurance” to be the object of the contract, the insurance contract would be rendered invalid since total safety cannot be guaranteed.

- Moreover, it is well known that all insurance companies invest their funds in *ribā*, thus making all their funds suspect. In addition, some insurance companies pay life insurance policy holders a portion of its interest income, which is definitely forbidden *ribā*.

Moreover, it is clear that there is *ribā* between the insured and the insurance company, since the premia paid by the insured may be more or less than what the insurance company pays him with deferment. Thus, if the deferred payment exceeds the paid premia, there would be *ribā* of increase as well as deferment, and if it is equal, then there is deferment *ribā* alone, but both are equally forbidden.

Ibn ʿĀbidīn (d. 1252 A.H.) was the first to consider marine insurance impermissible. Thus, he ruled regarding insuring foreigners against marine losses: “It is thus my opinion that it is invalid for the merchant to take compensation for what perishes of his wealth, since that would be making binding that which is not”.<sup>5</sup>

More recently, this ruling was reinforced by the decisions of the first conference on Islamic economics in Makkah (1396 A.H./1976 A.D.) and by

<sup>4</sup>Narrated by Muslim, ʿAbū Dāwūd, Al-Tirmidhī, Al-Nasāʾī, and ibn Mājah on the authority of ʿAbū Hurayrah (mAbpwh).

<sup>5</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.3, p.273).



the Fiqh Academy in Jeddah in 1406 A.H./1985 A.D. that rendered commercial insurance invalid.

In this regard, 'Ibn Nujaym Al-Miṣrī<sup>6</sup> said: deception does not justify seeking compensation. Thus: if someone tells another that it is safe to take some road, but then he was robbed on that road, or if someone is told that it is safe to eat some food, but then was poisoned by eating it, there is no guaranty and no right for compensation. He then stipulated three exceptions to this general case, including the case where deception pertained to a contract condition (e.g. if he married a woman under the condition that she is free, but discovered that another can demand her return). In such cases, the deceived may seek compensation from the deceiver.

As an alternative, cooperative insurance among a group of people is legally valid as a charitable contribution and cooperation contract. In this contract, each participant pays his contribution voluntarily to reduce the effects of losses incurred by other participants, regardless of the type of loss (e.g. fire, drowning, theft, car accident, work accident, animal death, etc.). Moreover, cooperative insurance distinguishes itself from commercial insurance by not seeking to make profits.

In this regard, the second conference of Muslim scholars held in Cairo (1385 A.H./1965 A.D.) and the seventh such conference (1392 A.H./1972 A.D.) rendered as valid both social and cooperative insurance. This is also the opinion expressed by the Fiqh Academy in Makkah in 1398 A.H./1978 A.D. and the Fiqh Academy in Jeddah in ruling #9 in 1406 A.H./1985 A.D.

In summary, commercial insurance includes both *ribā* and *gharar*, and it may not be considered a form of guaranty (*kafālah*), even if considered for classification under the guaranty of an unknown and the guaranty of debts prior to maturity. Such insurance can never be viewed as any form of guaranty contract since the latter is a charitable contract while insurance is a probabilistic commutative contract. However, social and cooperative insurance are permitted since they are based on charitable contributions and cooperation to do well without being a commutative contract.

## 63.4 Guaranties for residents and visitors

As we have seen, the guaranty contract is primarily a charitable contract for which compensation is given in the hereafter. However, the guarantor may seek compensation from the principal for whatever expenses he incurs as a consequence of providing him guaranty. Both guaranties of property and guaranties of persons are permissible.

It is well known that some of the GCC countries require having a property and self guarantor for workers and businessmen who work there. Thus, the

<sup>6</sup> *Al-'Ashbāh wa Al-Nazā'ir*, Damascus: Dār Al-Fikr (p.252 onwards).



guarantor assures the authorities that he is responsible to deliver the foreigner workers to the relevant authorities for deportation once his residency permission expires or is voided. The guarantor also assures the authorities that he will bear the worker's travel expenses at such a time, as well as cover all of the worker's debts and other financial responsibilities if it is not possible to collect those debts directly from him or from his property.

Some countries' laws also require a guarantor of individuals and property to allow some of its citizens travel abroad for work, education, or postponement of military service, etc. The guarantor in such cases is bound to pay an amount of money if the guaranteed party does not present himself to the relevant authorities when requested.

In both forms of guaranty mentioned above, the guarantor may only demand fees to cover his expenses and compensate him for his effort, in addition to seeking compensation for any amounts of money he has to pay on behalf of the guaranteed. Any fees collected over and above such legitimate expenses are contrary to the guaranty's charitable nature, and are considered to be a form of forbidden injustice.<sup>7</sup> For instance, it is not permissible for the guarantor to transgress those legal boundaries by requiring the guaranteed party to pay him a percentage of his profits, or periodic payments that are not a compensation for any legitimate work, effort or expense.

Thus, item #1098 of the civil transactions law of U.A.E., which is derived from Islamic jurisprudence, stated the following: "It is not permitted for the guarantor to take a fee for his guaranty. If he takes any such compensation, he must return it to the guaranteed party. Thus, the guaranty would be dropped if he collects such fees from the creditor, the debtor, or from a third party with the knowledge of the creditor. If he takes such fees without the creditor's knowledge, he is still bound by his guaranty, but must return the fees he collected".

An explanatory note pertaining to this law states: "The guarantor is not allowed to collect fees for his guaranty for the following reason: If the debtor pays his debt to the creditor, then the fees collected by the guarantor would be a wrongful devouring of others' wealth. On the other hand, if the guarantor pays the debtor's debt and then seeks compensation for what he paid, he would thus be taking more than he lent the debtor (the fees being an increment), which is forbidden".

Thus, in summary, fees may be collected for guaranties of travelers only to cover real expenses and work associated with the guaranty, as well as to seek compensation for payments made on behalf of the guaranteed party. However, any additional fees that are collected would be forbidden property.

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<sup>7</sup> *Al-Kafālah* by Dr. °Alī Al-Sālūs.



## Part IX

# Transfer of debt (*Al-Ḥawālah*)



## Preliminaries

We shall discuss the transfer of debt contract in five chapters:

1. Definition, legality, cornerstone, and contract language.
2. Transfer of debt conditions.
3. Legal status.
4. Contract termination.
5. Seeking compensation from the principal.



## Chapter 64

# Definition, legality, and cornerstone

### 64.1 Definition

In the Arabic language, the term *hawālah* means “change” or “transfer”. The Ḥanafīs define the term legally thus: “The transfer of the liability for a debt from the legal personality of the debtor to the legal personality of the liable person named in the contract”. Thus, transfers of debt must be distinguished from guaranty contracts, since the latter entails the conjoining of liabilities rather than the transfer thereof. As a consequence, once a transfer of debt is concluded, repayment may not be sought from the original debtor.

However, the Ḥanafī jurists differed in opinion regarding the legal issue of whether or not a transfer of debt effects a “transfer of debt”. As we shall see below, the most correct opinion in this regard is the one that stipulates the transfer of debt. Indeed, that is the basis on which the author of *Al-<sup>c</sup>ināyah* defined transfers of debt thus: “The juristic definition of *al-hawālah* is ‘the transfer of debt from being a liability on the principal debtor to being a liability on the transferee, as a means of ensuring the debt’.”<sup>1</sup>

Similarly, the non-Ḥanafīs defined a transfer of debt as a contract by means of which a debt is transferred from one person’s liability to another’s.<sup>2</sup>

### 64.2 Legality

There are proofs in the Sunnah and ’Ijmā<sup>c</sup> for the legality of transfers of debt to transfer debts, the obvious exception being the forbidden trading of debts for

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<sup>1</sup>Ibn Al-Humām ((Ḥanafī), vol.5, p.443), ’Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.4, p.300), Majma<sup>c</sup> Al-Ḍamānāt (p.282).

<sup>2</sup>Al-Dardīr ((Mālikī)A, vol.3, p.325), Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.193), ’Ibn Qudāmah (, vol.4, p.528), Mar<sup>c</sup>ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.114), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.370).



debts:

- The proof from Sunnah is provided by the Ḥadīth in which the Prophet (pbuh) is reported by Al-Bayhaqī to have said: “Delinquency of rich debtors is a form of transgression, so if one of you has his debt transferred to a rich person, let him accept the transfer of debt”.<sup>3</sup> The majority of jurists infer from this Ḥadīth that it is preferred to accept the transfer of debt, but that it is not an obligation. On the other hand, Dāwūd and ‘Aḥmad ruled that the text of the Ḥadīth includes an order which makes it obligatory to accept the transfer of debt [where the transferee is rich].<sup>4</sup>
- There is also proof for the legality of transfers of debt provided by the consensus of jurists on its permissibility.<sup>5</sup> In this regard, jurists have permitted transfers of debt for the transfer of fungible debts. However, it is not permissible for non-fungibles since the transfer of liability may only be effected for fungibles.

### 64.3 Cornerstone

The Ḥanafīs stipulate as cornerstones of the transfer of debt contract: (i) an offer by the debtor, and (ii) acceptance by the transferee and the creditor, using specific language that indicate the nature of the transfer of liability as a *ḥawālah*. In this regard, the Ḥanafīs insisted on the consent of the transferee since the contract transfers liability for the debt to him, which thus requires his consent to establish a liability upon himself. Even in the case where the transferee may be indebted to the principal debtor of a transfer of debt, changing the creditor for his debt still requires his consent since creditors vary in their degree of aggressiveness in collecting repayments.<sup>6</sup>

<sup>3</sup>Narrated by ‘Aḥmad and the authors of the six major books of Ḥadīth, as well as ‘Ibn ‘Abī Shaybah, and Al-Ṭabarānī in his *‘Aṣṣaṭ* on the authority of ‘Abū Hurayrah. It was also narrated with slightly different wording by ‘Aḥmad, ‘Ibn Mājah, and Al-Tirmidhī on the authority of ‘Ibn ‘Umar. Another narration by Al-Bazzār on the authority of Jābir has a weak link in its chain of narrators; c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.59), ‘Ibn Ḥajar (, p.250), Al-Haythamī (, vol.4, p.130), Al-Ṣan‘ānī (2nd printing, vol.3, p.61), Al-Shawkānī (, vol.5, p.236).

<sup>4</sup>Al-Ṣan‘ānī (2nd printing, vol.3, p.61), ‘Ibn Qudāmah (, vol.4, p.527), Al-Sha‘arānī ((Shāfi‘ī), vol.2, p.80).

<sup>5</sup>‘Ibn Qudāmah (, vol.4, p.521), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.337), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.193), ‘Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.294), ‘Ibn Al-Humām ((Ḥanafī), vol.5, p.444).

<sup>6</sup>Translator’s note: I decided not to use the literal translation of “transferor”, “transferee” and “transferred” for “*muḥīl*”, “*muḥāl ‘alayh*” and “*muḥāl*”, respectively. This translation would be cumbersome and confusing to the reader. Thus, I decided to designate the transferor as the principal debtor, the transferred as the creditor, and only use the literal translation for transferee. In this context, the most common scenario is that the “principal debtor” or transferor simultaneously owes the “creditor” or “transferred” a sum of money, and is owed an equal or larger amount by the transferee or “ultimate debtor” in the chain. The transfer of debt then empowers the creditor to collect his money from the transferee instead of collecting it directly from the principal debtor.



The creditor's consent is also required for a transfer of debt since the liability being transferred pertains to a debt that is owed to him. In this regard, since debtors vary in their credit-worthiness and promptness of payment, transferring his credit from one party to another requires his consent.

Al-Qadūrī also stipulated the principal debtor's consent as a condition for the validity of a transfer of debt. He based this ruling on the view that some honorable debtors may not accept to have others bear their debts. On the other hand, it is thus stated in *Al-Ziyādāt*, according to a popular Ḥanafī opinion, that "a transfer of debt is valid without the consent of the principal debtor, since the transferee's acceptance of transferring liability to himself is a personal matter than only benefits and does not harm the principal debtor".<sup>7</sup>

The Ḥanbalīs and Ṣāḥirīs ruled that only the consent of the principal debtor is a condition of the contract. In this regard, they rely on the above mentioned Ḥadīth to conclude that the creditor and the transferee are bound to accept the transfer of debt, rendering their expression of consent unnecessary.<sup>8</sup> Notice that this opinion is the exact opposite of the Ḥanafī opinion, as it pertains to whose consent is necessary. In this regard, the Ḥanbalīs ruled that it is sufficient for the creditor and the transferee to be informed of the transfer of debt. In this regard, they did not require the consent of the transferee since they argued that the principal debtor may collect his debt from the transferee either himself, or through an agent. In this regard, the principal debtor has appointed the creditor as his agent in collecting the debt from the transferee.

The majority of Mālikīs and the majority of Shāfi'īs ruled that the consent of the principal debtor and creditor only. They based the first requirement on the view that the principal debtor may repay his debt in any way he may wish, and thus must not be bound to paying in any given way without his consent. They also argued that the creditor's consent is required since his credit is established as a liability on the principal debtor, and therefore his consent is required to transfer that liability to another person whose creditworthiness and promptness of payment may be different from the first. In this regard, they argued that the above mentioned Ḥadīth does not compel the creditor to accept the transfer of debt, since they ruled that the Ḥadīth merely makes such acceptance desirable (*mustaḥabb*).

On the other hand, they argued that consent of the transferee is not necessary, since the principal debtor has the right to collect what the transferee owes him through another person. In this regard, the transfer of debt is simply an authorization to the creditor to collect his money from the transferee, which does not require the consent of the ultimate debtor (the transferee in this case). The main difference between the creditor and the transferee is thus that the former has a right that cannot be transferred without his consent (in analogy to a seller who is owed a price) while the latter's liability is tantamount to the

<sup>7</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.15), 'Ibn Al-Humām ((Ḥanafī), ibid., footnote), Al-Ṭaḥāwī ((Ḥanafī), p.102), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.301 onwards).

<sup>8</sup>'Ibn Qudāmah (, vol.4, p.522,525,527), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.114), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.374).



object of sale, whose consent is not required.<sup>9</sup>

Thus, we can enumerate six cornerstones or components to the transfer of debt for the majority of (non-Ḥanafī) jurists: (i) principal debtor or transferor, (ii) creditor or transferred party, (iii) transferee or ultimate debtor, (iv) the transferred debt, (v) a debt owed to the principal debtor by the transferee or ultimate debtor, and (vi) contract language.<sup>10</sup>

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<sup>9</sup>Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.294), Al-Dardīr ((Mālikī)A, vol.3, p.325), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.338), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.193 onwards).

<sup>10</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), ibid.), Ibn Al-Humām ((Ḥanafī), vol.5, p.443).



## Chapter 65

# Transfer of debt Conditions

The Ḥanafis stipulate contract conditions for the transfer of debt that pertain to the contract language, the principal debtor, the creditor, the transferee, or the object of transfer. In what follows, we shall list those conditions in that order.

### 65.1 Contract language conditions

The transfer of debt contract is concluded through verbal or written offers and acceptance. For instance, an offer can be issued by the principal debtor by saying: “I have transferred your credit to so and so”, and the creditor may issue an acceptance by saying: “I agree”. In this regard, both offer and acceptance must take place during the contract session, and the contract is binding and does not admit contract session or conditional options.

### 65.2 Transferor conditions

The transferor (principal debtor) must be eligible to conduct such contracts, i.e. he must be of legal age and a sane mind. Thus, transfers of debt issued by insane persons or undiscerning children are invalid, since that is a financial contract that requires sanity and discernment. In this regard, a transfer of debt concluded by a discerning child is not considered executable. Rather, it is considered suspended upon the approval of his guardian. Thus, we can see that being of legal age is an executability condition rather than a conclusion condition.

Second, validity of the transfer of debt is predicated upon the consent of the principal debtor. Thus, a transfer of debt concluded by a coerced transferor is not valid. This follows from the fact that a transfer of debt involves an absolution that results in ownership transfer, and thus coercion renders it defective in



analogy to other transfers of ownership.<sup>1</sup> The Mālikīs, Shāfiʿīs, and Ḥanbalīs agreed with the Ḥanafīs on this condition. In this regard, ʾIbn Kamāl said in *Al-ʾIdāh*: “the consent of the transferor is a condition to justify seeking compensation from him”.

### 65.3 Transferred party conditions

There are three conditions for the creditor or transferred party in a transfer of debt:

1. He must be eligible for the contract. In this regard, sanity is a condition of conclusion of the contract since the cornerstone of acceptance cannot be fulfilled if that condition is not satisfied. He must also be of legal age as an executability condition, as we have seen in the case of the transferor; thus requiring approval of his guardian if he is not of legal age.
2. The Ḥanafīs, Mālikīs and Shāfiʿīs all agree that the transferred party must be consenting to the transfer of debt, otherwise the contract is not valid.
3. ʾAbū Ḥanīfa and Muḥammad ruled that acceptance must be issued by the transferred party during the contract session, and listed this as a conclusion condition. Thus, they ruled that if the transferred party was absent from the transfer of debt session, but accepts when he receives information about the contract, the contract is not executable. However, ʾAbū Yūsuf ruled that this is a condition of executability rather than conclusion. Al-Kāsānī argued that the opinion of ʾAbū Ḥanīfa and Muḥammad is the correct one, since acceptance of the transferred party is a cornerstone of the contract (c.f. *ibid.*).

### 65.4 Transferee conditions

The Ḥanafī conditions for the transferee are exactly the same three conditions listed above for the transferred party.<sup>2</sup>

### 65.5 Transferred item

There are two conditions pertaining to the transferred item in a transfer of debt. Those two conditions are:<sup>3</sup>

<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.16), *Majmaʿ Al-Ḍamānāt* (p.282).

<sup>2</sup> Al-Kāsānī ((Ḥanafī), *ibid.*).

<sup>3</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.16), ʾIbn Ruṣhd Al-Ḥafīd ((Mālikī), vol.3, p.295), Al-Dardīr ((Mālikī)A, vol.3, p.325 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.194), ʾAbū-ʾIṣḥāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.337), ʾIbn Qudāmah (, vol.4, p.533).



1. The transferred item must be a debt, i.e. the transferor must be a debtor to the transferee. If no such debt exists, then the contract is one of agency rather than transfer of debt. As a consequence of this condition, transfers of debt are not allowed for non-fungible items, since those cannot be established as liabilities.
2. The debt must be binding. For instance, in the historical example of *al-mukātab* (a slave who can free himself for a sum of money), a transfer of debt could not be used for the sum of money necessary to free the slave since it is not a binding debt.

In general, any debt that does not qualify for guaranty does not qualify for a transfer of debt. The debts that qualify for both are non-probabilistic debts that are sometimes called “real debts”.

Thus, the transfer of debt is not valid if the debt owed the transferor by the transferee is not binding (e.g. the debt of a young boy or a mentally incompetent person without their guardian’s consent). In such cases, the transfer is not valid since the debt on such parties is not binding, and may be dropped by their guardian.

Similarly, liability for the price in a sale suspended by an option is not binding, and thus does not qualify for transfers of debt.

All non-Ḥanbalī jurists agree on the condition that a debt must be binding to qualify for a transfer of debt. On the other hand, the Ḥanbalīs permitted transfers of debt even for the monies required to free a slave, or for the liability of a sales price during the option period.

Also, the Shāfi‘īs allowed transfers of debt for debts that will ultimately become binding, e.g. liability for a price that will take effect once a contract option is exercised or expired, liability for dowry prior to consummation of the marriage, and liability for wages prior to completion of the job.

On the other hand, the Ḥanafīs did not make it a condition for the validity of a transfer of debt that the transferee must be indebted to the transferor prior to the transfer prior to the contract. Thus, they render as valid transfers of debt whether or not the transferee owes the transferor, and whether the transfer is restricted or unrestricted (as we shall see below).

On the other hand, the Mālikīs and Shāfi‘īs stipulated three conditions for the object of transfer in a transfer of debt:<sup>4</sup>

1. The transferred debt must have matured.
2. The transferred debt must be equal to the debt owed to the transferor by the transferee in kind and amount. If there is any difference between the two debts, they consider this no longer to be a transfer of debt, and classify it under the forbidden trading of one debt for another.

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<sup>4</sup>Al-Dardīr ((Mālikī)B, vol.3, pp.425-6), Al-Dardīr ((Mālikī)A, vol.3, p.326 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.194 onwards).



3. Neither of the two debts must be foodstuffs named as the object of a *Salam* sale, lest the contract falls under the category of selling foodstuffs prior to receiving them, which is forbidden. However, if one of the two debts resulted from a sale and the other from a loan, the transfer of debt is permissible if the transferred debt is not forbidden.

### Restricted and unrestricted transfers of debt

The Ḥanafīs classified transfers of debt into two categories; restricted and unrestricted:

- In an unrestricted transfer of debt, the principal debtor (transferor) transfers his debt to a transferee who accepts the contract, without tying the transfer to a transferee debt towards the transferor. Only the Ḥanafīs, 'Imāmī Shī'īs, and most of the Zaydīs permitted this type of transfer of debt.

However, the Mālikīs, Shāfi'īs, and Ḥanbalīs consider this type of unrestricted transfer of debt a pure guaranty, the validity of which requires the consent of all three parties (transferor, transferred party, and transferee).

- All jurists accept what the Ḥanafīs call a restricted transfer of debt, whereby the transferor ties the transferred debt to a debt owed to him by the transferee.<sup>5</sup>

The Ḥanafīs argued that both types of transfers of debt are permissible based on the general language regarding transfer of liability in the above referenced Ḥadīth. However, unrestricted transfers of debt differ significantly from restricted ones in the following respects:<sup>6</sup>

1. If the transfer of debt is unrestricted, and the transferee does not owe anything to the transferor, then the transferee may only be asked to pay the amount of transferred debt.

On the other hand, if the transferee owes the transferor an amount, but the transfer of debt was not tied to that debt, and the transferee accepted that arrangement, then the transferee is subject to two liabilities (one for his initial debt, and one for the liability he accepted through the transfer of debt). For instance, if a man deposited \$1000 with another, and then transferred a liability for \$1000 to the depositary without tying it to the deposit, with the consent of the depositary, then the depositor may collect

<sup>5</sup>The legal scholar Dr. Al-Sanhūrī argued that this form of contract is in fact closer to being a means of debt payment than it is to being a *hawālah* in the precise juristic sense, c.f. *Al-Wasīl* (p.240). It is also his view that all schools of Islamic jurisprudence did not permit transfers of debt in the western sense. He argued, however, that Mālikīs differed from other schools by permitting the transfer of rights according to some conditions, through the vehicles of giving debts as gifts, or selling debts to a party other than the debtor, c.f. *Al-Wasīl* (p.240). Those views are debatable.

<sup>6</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.16 onwards), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.306), Majma' Al-Ḍamānāt (p.283).



his deposit, while the depositary would still be responsible to pay the \$1000 liability according to the transfer of debt.

However, if the transfer of debt is tied to the debt owed by the transferee, then the transferor may no longer seek repayment from him. In this case, the transfer of debt was tied to the debt, and thus both are tied together, and the money of the debt serves as a quasi-pawned object, and payment of the transferred debt would result in mutual cancellation of the two debts.

2. If the transfer of debt is tied to a debt of the transferee, but then it is found out that the transferee is free of the debt to which the transfer was tied (e.g. if the debt was the price of a sold item which was subsequently returned), the transfer of debt is voided. In this regard, since the transfer of debt was tied to that debt, there is no transfer of debt if there is no debt.

On the other hand, the transfer of debt is not voided if the transfer of debt was unrestricted and then it was discovered that the transferee is not indebted to the transferor. In this latter case, the transfer of debt is tied to the transferee's liability and not to any other specific debt.

3. If the transfer of debt is tied to a debt, and the transferor dies prior to repayment of his debt by the transferee with other debts and no credits other than the one with the transferee, then 'Abū Ḥanīfa, 'Abū Yūsuf and Muḥammad ruled that the transferred creditor has no preferential right to that money over other creditors of the deceased transferor. Zufar, on the other hand, ruled that the transferred creditor has priority over the other creditors, in analogy to the holder of a pawned object.

However, Zufar's opinion was rejected on the basis of the difference between transfers of debt and pawning, where the pawn-broker bears the risk of the pawned object alone. Thus, the legal ruling in this case rests on the Ḥadīth "returns are due to the one who bore the risk of guaranty".<sup>7</sup> In this regard, the transferred creditor does not carry any more of the risk than other creditors, and hence is not allowed preferential rights of collection, and he must share equally with other creditors.

On the other hand, if the transfer was unrestricted, then the total amount of debt owed by the transferee to the transferor is collected and distributed among the other creditors, without paying any share to the transferred

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<sup>7</sup>Narrated by 'Aḥmadn, Al-Shāfi'ī, and 'Abū Dāwūd Al-Ṭayālīsī, as well as the authors of the four *Sunan* books. It was also rendered a valid Ḥadīth by Al-Tirmidhī, 'Ibn Ḥibbān, 'Ibn Al-Jārūd, Al-Ḥākim, and 'Ibn Al-Qaṭṭān on the authority of 'A'ishah. In another narration in Al-Nasā'ī, the Prophet (pbuh) is narrated to have ruled that "income is earned by the one who guaranteed the object, and he (pbuh) forbade profits derived from what one has not guaranteed". In one narration, this Ḥadīth is put in the context of a man who bought a slave and then returned him under the defect option clause, and when the seller asked for a the output of his sold slave, the Prophet (pbuh) ruled that his output belonged to the one who guaranteed him; c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.2, pp.28-32), Al-Shawkānī (, vol.5, p.213).



creditor. In this regard, the transferred creditor's right is established only with the transferee, and he thus has no right attached to the debt owed the transferor by the transferee.

### Transfer of rights

The transfer of rights is a replacement of one debtor in place of another in his relationship with the creditor. If the established debt for which one debtor replaces another is a fungible established as a liability, then the transfer of debt is a valid transfer of rights, in which the principal debtor is a transferor, and the ultimate debtor is the transferee. As we have seen, jurists agree on the validity of such transfers of debt.

Moreover, the transfer of rights is also valid according to the four Sunni schools of jurisprudence, and not only for the non-Ḥanafis as some professors of law and Islamic law understood. This follows since the permitted restricted transfers of debt in the Ḥanafī school include transfers of rights. For instance, if one person is indebted to another and a creditor for a third, he may effect a transfer of debt so that his creditor may collect the debt from his debtor. This is therefore a transfer of debt and a transfer of right at the same time.

We have also seen that non-Ḥanafis only permit restricted transfers of debt (and it is thus understood that a transfer of debt is restricted unless otherwise specified). In this regard, they require the two debts to be equal in genus, kind and amount. Thus, if the debt owed by the transferor and that owed by the transferee are identical in genus and amount, they render the transfer of debt valid, otherwise they render it invalid.

In contrast, the Ḥanafī notion of an unrestricted transfer of debt is a transfer of debt only, without any transfer of rights. This follows since only the debtor is exchanged, but the transferor remains to be a creditor for the transferee.

There are many examples of restricted transfers of debt that are viewed as transfers of rights. For instance:

- A seller may transfer his debtor's credit to the buyer (to collect the price in lieu of his credit).
- A pawn-broker may transfer a creditor to the pawner for collection of his debt.
- A wife may transfer a creditor to her husband to collect his debt from the dowry.
- The beneficiary of a mortmain may transfer his creditor to the administrator of the mortmain to collect his share of the crop.
- A debtor beneficiary from the spoils of war may transfer his creditor to the ruler to collect what he is owed.

In all such examples, a new debtor takes the place of the principal debtor by virtue of the transfer of debt as a transfer of debt and a transfer of rights.



The reason some scholars were confused regarding the Ḥanafī views on transfers of rights stems from the Ḥanafī doctrine that transfers of debt are not a form of sale that is subject to all its rulings. Instead, they view transfers of debt as a separate contract that was legalized for a different necessary reason, and not as a branch of another more general contract. On the other hand, they do recognize that transfers of debt are similar to a number of other contracts. For instance, it is similar but not identical to a sale (of debt or of rights), similar but not identical to guaranty, similar but not identical to debt collection, and similar but not identical to collection agency. It is also similar but not identical to the current practice of opening a credit account, and it has some characteristics similar to charitable contributions and to commutative contracts, etc. In fact, the legal status of transfers of debt reflects all the various similarities it has with other contracts.

Indeed, despite the fact that Ḥanafīs did not permit the sale of debt to any party other than the debtor, they do not deny the legality of transfers of rights. This follows since they do not recognize the replacement of one debtor with another as a change of ownership of the debt. Instead, they recognize the essence of a transfer of debt as a temporary transfer of the debt, or the locus of demanding its repayment, provided that the transferee does not die, declare bankruptcy, or deny having accepted the transfer of debt. They then argue that the transferred party would only gain ownership of what he collects from the transferee, without ever owning a new debt. Thus, they differentiate between transfers of debt and sales.

On the other hand, the non-Ḥanafī jurists who permit transfers of rights base their rulings on the general permissibility implied by the above mentioned Ḥadīth on transfers of debt. This permissibility is thus not restricted on whether or not one views the contract as trading one debt for another.

As for trading one debt for another or giving a debt as a gift to a party other than the debtor, the Ḥanbalīs do not permit such practices, while the Mālikīs and Shāfi'īs permit them subject to a number of conditions. For instance, they require for such practices that compensation is received or identified during the sales contract, that the sold debt is not foodstuffs, that the price and the sold debt are of different genera, and that the debtor's debt is not sold to his adversary so that he may be subjugated to that adversary. Thus, they do not consider the transfer of rights to be a form of trading one debt for another.

In summary, Muslim jurists do not classify transfers of debt as a form of sale, but rather classify it as a special contract with different conditions and consequences.<sup>8</sup> In this regard, the Mālikīs and Shāfi'īs who permit giving debts as gifts or selling them to a party other than the debtor only allow the transfer of rights in such contracts subject to a list of special conditions for those contracts.

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<sup>8</sup>See the transfer of debt chapter in the Kuwaiti Fiqh Encyclopedia (pp.95-100), as well as the introduction to *Naẓariyyat Al-'Itizām fī Al-Fiqh Al-'Islāmī* by Professor Al-Zarqā' (p.64 onwards).



## Chapter 66

# Legal Status

There are three main effects pertaining to the legal status of a transfer of debt, as detailed below.<sup>1</sup>

### 66.1 Absolution of the transferor

The majority of jurists ruled that if a transfer of debt is concluded with the consent of the transferor (or principal debtor), then he is thus absolved of his debt towards the creditor. However, any means of ensuring repayment of the debt, e.g. pawning or third-party guaranty, are thus terminated rather than transferred for the benefit of the new debt.

On the other had, Al-Ḥasan Al-Baṣrī ruled that the transferor is only absolved if the creditor absolves him explicitly. Similarly, the Ḥanafī jurist Zufar ruled that a transfer of debt does not result in absolution for the transferor, whose liability for the debt remains intact as before. He based this ruling on analogy to the case of a guaranty contract, considering both types of contracts as means of ensuring repayment.

However, this minority opinion is invalid, since the very name of the contract (*ḥawālah*) suggests that the contract is a transfer of rights, which implies that the initial rights do not remain the same after being transferred. In this regard, the best way to ensure repayment of debts is to choose the most creditworthy debtors one can find. In contrast, the guaranty contract is in essence a conjoining of liabilities, as its name *kafālah* suggests. In this regard, the legal status of contracts can often be inferred from the etymology of contract names.<sup>2</sup>

The major Ḥanafī jurists differed in opinion regarding the nature of the transfer that is effected by means of a transfer of debt:

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.17 onwards), <sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.160).

<sup>2</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.17), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.445 onwards), Al-Ṭahāwī ((Ḥanafī), p.102), 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.4, p.300), Al-Dardīr ((Mālikī)A, vol.3, p.328), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.195), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.338), 'Ibn Qudāmah (, vol.4, p.525).



- 'Abū Ḥanīfa and 'Abū Yūsuf ruled that both the debt and the liability to be asked to repay are transferred from the principal debtor to the transferee. They ruled, however, that if the transferee dies in a state of bankruptcy, or if he denies having consented to the contract and no proof can be provided to document it, then the liability returns to the principal debtor. Muḥammad and 'Abū Yūsuf also stipulated that the liability returns to the principal debtor if the transferee declares bankruptcy during his lifetime.

They thus ruled that if the creditor absolves the transferee of the debt, the absolution is valid, but if he absolves the principal debtor after the transfer of debt, the absolution is invalid.

- Muḥammad ruled that the transfer of debt only transfers the liability to be asked to pay the debt, without transferring the debt itself. Thus, he ruled that liability for the original debt remains with the principal debtor. The proofs of 'Abū Ḥanīfa and 'Abū Yūsuf on the one hand, and those of Muḥammad on the other, suggest that the opinion of the first two is on more solid footing. As proof for this preference of the first opinion, note that it is not valid to absolve the principal debtor after the transfer of debt is concluded, establishing that the debt had been transferred from being a liability on the principal debtor to being a liability on the transferee. This result also follows from the etymology of the term *ḥasālah*, which indicates transference of whatever the contract pertains to, which includes the debt itself as well as the obligation to receive requests of repayment.
- We have previously reported the opinion of Zufar that neither the debt nor the obligation to receive requests of repayment are transferred to the transferee. Instead, it was the opinion of Zufar that the liabilities of the transferee and the principal debtor are conjoined by virtue of the contract, in analogy to the case of guaranty.

## 66.2 Right to demand repayment

The transfer of debt establishes the creditor's right to demand repayment of the debt from the transferee. This follows from the fact that the transfer of debt transferred the liability for the principal debtor's debt to the transferee, according to the opinion I chose by juristic preference (*tarjīh*) in the previous section.

## 66.3 Right of pursuit

If the creditor exercises the right to pursue the transferee (transferor) until he repays him, the transferee thus has the right to pursue the transferor to get rid of being himself pursued. Similarly, if an unrestricted transfer of debt is initiated by the transferor, and if the transferee does not owe the transferor and



equal amount, then if the creditor incarcerates the transferee in lieu of the debt, he may in turn incarcerate the transferor in his place.

On the other hand, if the transferor did not initiate the transfer of debt, or if he initiated it but the transferee owes him an equal amount, i.e. if the transfer of debt is restricted, then the transferee does not have the right to pursue the transferor if himself pursued, or to incarcerate him if himself incarcerated.



## Chapter 67

# Contract Termination

A transfer of debt may be terminated in one of seven ways:<sup>1</sup>

### 67.1 Voiding

If a transfer of debt is voided, the creditor may once again demand repayment from the principal debtor. In this regard, jurists define contract voiding as any termination of the contract prior to accomplishing its objective.

### 67.2 Death or bankruptcy

The Ḥanafīs ruled that a transfer of debt is terminated at the incidence of any death, bankruptcy, or denial of the contract that makes its implementation impossible. This ruling is based on the narration that ʿUthmān (mAbpwh) said: “if [a transferee] dies in a state of bankruptcy, then the debt is reestablished as a liability on the transferor”. In this regard, since a transfer of debt is intended to secure the rights of the creditor, the condition of the transferee’s ability to repay the debt is similar to the condition of good quality in an object of sale.

In this regard, jurists have differed in their definition of the conditions under which they recognize that the transferee may never repay the debt:

- ʿAbū Ḥanīfa ruled that there are two such conditions: either (i) the transferee dies in a state of bankruptcy, or (ii) he denies having consented to the transfer of debt and the transferor fails to provide proof to the contrary.
- ʿAbū Yūsuf and Muḥammad added to the two conditions listed by ʿAbū Ḥanīfa a third: which is legal declaration of bankruptcy in a court of law during the transferee’s lifetime. This addition is based on another juristic

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.18 onwards), ʿIbn Al-Humām ((Ḥanafī), vol.5, p.447), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.52), ʿIbn ʿĀbidīn ((Ḥanafī), vol.4, p.304), Majmaʿ Al-Ḍamānāt (p.282).



rule about which the three differ. This rule according to 'Abū Yūsuf and Muḥammad is that they allow a judge to rule that a person is legally bankrupt, while 'Abū Ḥanīfa does not allow a judge to rule thus, since wealth comes and goes.

For each jurist, if one of the conditions he recognizes for impossibility of collecting the debt from the transferee is effected, then the creditor must once again demand repayment from the transferor (the principal debtor).

On the other hand, the Ḥanbalīs, Shāfi'īs and Mālikīs ruled that if the transfer of debt is concluded, and the creditor consents to the transfer of liabilities, he no longer has a right to demand repayment from the transferor under any circumstances, whether or not it is possible to collect from the transferee. Even if the transferee was in fact bankrupt at the time of contract, and even if the creditor did not know of that bankruptcy when he accepted the transfer of debt, he has no recourse to the transferor. In the latter case, the creditor is considered negligent not to have investigated the transferee's financial position prior to agreeing to the contract, in analogy to one who is cheated in a sale where he could have avoided being cheated. However, if the creditor stipulates a condition that the transferee must be in good financial position, and then discovers that he was in fact facing financial difficulties, then the Mālikīs and Ḥanbalīs ruled that he may again seek repayment from the principal debtor. They based that final ruling on the Ḥadīth: "Muslims are bound by their conditions".<sup>2</sup> The Mālikīs ruled in addition that if the transferor principal debtor deceived the creditor by knowingly signing a transfer of debt with a bankrupt transferee, then the creditor may still demand repayment from the transferor.

The proof for this general non-Ḥanafī ruling is based on the narration that the grandfather of Sa'īd ibn Al-Musayyab "was owed a debt by 'Alī (mAbpwh). The creditor then transferred the debt through a transfer of debt, but the transferee died shortly thereafter. When the creditor then informed 'Alī that the transferee had died, he told him 'you chose him over us, so stay away'." Thus, he ruled that the transfer of debt ended the creditor's right to demand repayment from the principal debtor, and did not tell him that he has any such right after the transferee's death. This is proof that the transfer of debt establishes absolution of the debt, which was established with a solid contract, and thus the absolution is final. As for the narration regarding 'Uṭhmān, which the Ḥanafīs used as proof for their position, it must be false, otherwise the statement of 'Alī would contradict his statement.<sup>3</sup>

<sup>2</sup>This Ḥadīth was previously discussed, as narrated by Al-Tirmidhī and Al-Ḥākim on the authority of 'Amr ibn 'Awf, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.112), Al-Ṣan'ānī (2nd printing, vol.3, p.59).

<sup>3</sup>'Ibn Qudāmah (, vol.4, p.526), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.296), 'Ibn Juzayy ((Mālikī), p.327), Al-Dardīr ((Mālikī)A, vol.3, p.326), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.338), Al-Khaṭīb Al-Shīrīnī ((Shāfi'ī), vol.2, p.195 onwards).



### 67.3 Debt repayment

Naturally, if the transferee repays the debt to the creditor, the transfer of debt is terminated, since its legal status ceases to exist.

### 67.4 Death of the creditor or debtor

If the creditor dies, and the transferee inherits the debt of the transfer of debt, the contract is terminated. In this regard, inheritance is a means of transferring ownership, and thus results in ownership of the debt by the transferee in this case.

'Abū Ḥanīfa, 'Abū Yūsuf, and Muḥammad also ruled, in opposition to other jurists, that a restricted transfer of debt is terminated upon the death of the principal debtor. They based this opinion on the fact that the property to which the transfer of debt was tied thus becomes part of the principal debtor's estate.

### 67.5 Gift

If the creditor gives the property established as debt as a gift to the transferee, and if the latter accepts that gift, then the transfer of debt is terminated.

### 67.6 Charity

Similarly, if the creditor gives the debt as a charitable payment to the transferee, and if the latter accepts that charity, then the transfer of debt is terminated. This case and the one before follows from the fact that gift and charity receipt are similar to inheritance and repayment of the debt.

### 67.7 Absolution

If the creditor absolves the transferee of the debt, the transfer of debt is terminated.



## Chapter 68

# Compensation of the Transferee

In this chapter, we discuss two topics: (1) the conditions under which the transferee may seek compensation from the transferor, and (2) listing of what may be sought from the transferor. We then end the chapter with two more sections on disagreements between the transferor and the creditor, and on modern bills of exchange (*suftāj*).

### 68.1 Conditions for demanding compensation

There are three conditions under which the transferee may seek compensation from the transferor:

1. The transfer of debt must be initiated by the transferor in order for the transferee to seek compensation from him. Otherwise, if the transfer of debt is initiated by another party (e.g. the creditor), the transfer may be valid, but the transferee may not seek compensation from the transferor upon repaying his debt. In the latter case, the transferee is considered to have paid the transferor's debt as a voluntary charity, without transferring ownership of the debt to the transferee.
2. The transferee is only entitled to demand compensation from the transferor after having paid his debt, or received it as a gift, charity or inheritance. All such events would make the transferee the owner of the transferor's debt, and thus may seek compensation through repayment.

However, if the transferee is absolved of the debt, he may not seek payment from the transferor, since absolution drops his right to the debt.

3. For the transferee to seek compensation from the transferor, he must not be indebted to the transferor with a debt similar to the one that was transferred. If, however, the transferee is indebted to the transferor



with an equal debt, then the two debts are mutually cancelled through a *muqāṣṣah*).<sup>1</sup>

## 68.2 Type of compensation

If the transferee is entitled to seek compensation from the transferor, he may only seek compensation equivalent to the transferred debt, and not the amount actually paid, in analogy to guaranty. Thus, if the transferred debt was monetary, and the transferee paid it in kind, he may only demand monetary compensation. In this regard, whatever compensation is sought by the transferee must be in accordance with the debt that he owns by virtue of the transfer and repayment. In this case, the owned debt is that which was transferred, and not the amount actually paid in lieu of that debt. This is in analogy to the case of guaranty, and in contrast to the case of an agent for debt-payment.

## 68.3 Transferor-creditor disagreements

Consider the case where the creditor collects the transferred debt, and then disagrees with the transferor. For instance, the transferor may deny having been indebted to the creditor and claim that he was in fact his agent for collecting his debt from the transferee, and demand delivering the collected property to him. In this case, the transferor's claim is accepted if backed by his oath. In this case, the creditor is claiming that the transferor owed him, while the transferor is denying it. In all such cases, the claim of the denier is accepted subject to his oath, unless the claimant can provide a material proof for his claim.<sup>2</sup>

## 68.4 Contemporary bills of exchange

We have studied bills of exchange in the part on loans. In this contract, a person gives some property to a merchant to pay to another in a different country. The sender thus benefits by insuring himself against the risks of transferring that property himself. This practice is reprehensible to the level of prohibition in the Ḥanafī school, since it is in essence a loan that benefits the lender (against the risks of transportation). Such loans that benefit the lender were forbidden in a Ḥadīth of the Prophet (pbuh).<sup>3</sup>

<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.19), Majma' Al-Damānāt (p.283).

<sup>2</sup>Al-Kāsānī ((Ḥanafī), ibid.), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.449), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.57), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.305).

<sup>3</sup>Al-Ḥārith ibn 'Abī 'Usāmah narrated on the authority of 'Alī that he said that the Prophet (pbuh) said: "every loan that brings a benefit to the lender is *ribā*". The people of Ḥadīth found fault in the chain of narrations of this Ḥadīth due to its inclusion of Suwār ibn Muṣ'ab, whose narrations are disregarded. It was also narrated b Al-Bayhaqī in *Al-Sunan Al-Kubrā* on the authority of 'Ibn Mas'ūd, 'Abū ibn Ka'b, 'Abdullāh ibn Salām, and 'Ibn 'Abbās, with truncated chains of narration at their levels. There is another Ḥadīth narrated by 'Ibn 'Udayy in *Al-Kāmil* on the authority of Jābir ibn Samurah that he said that the Prophet



The reprehensibility of this practice is predicated on stipulating a condition of ensuring against the risks of transportation. However, if the loan is extended without stipulating a condition that the borrower must deliver the property in another country, the loan is thus valid. It is also permissible to give the merchant such property to deliver to someone in another country as a trust rather than a guaranteed loan.<sup>4</sup>

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(pbuh) said: “bills of exchange (*al-suftajāt*) are forbidden”, but this is a weak Ḥadīth with a weak link in its chain of narration, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.60), Ibn Ḥajar (, p.254).

<sup>4c</sup>Abd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.162).



## Part X

# Pawning/Mortgage (*Al-Rahn*)



## Preliminaries

We shall study the pawning/mortgage contract in seven chapters:

1. Definition, legality, cornerstones, and types.
2. Conditions (pertaining to contracting parties, contract language, debt for which pawning takes place, pawned object, conditions of conclusion, receipt of pawned object, properties eligible for pawning, consequences of receipt and other conditions).
3. Legal status and effect (valid vs. defective pawning).
4. Inherent growth of a pawned object.
5. Increase in the pawned object and/or the debt.
6. Termination of pawning.
7. Disagreement between the contracting parties.



## Chapter 69

# Definition, Legality & Cornerstones

### 69.1 Definition

The Arabic term “*rahn*” may refer either to constancy, or to holding and bindingness. In this regard, the verse “every soul will be held (*rahīnah*) in pledge for its deeds” [74:38] refers to the binding aspect of the term. Of the two opinions, the holding aspect is the more physical one, and hence we deem it to be the primary linguistic meaning, while the permanency meaning is derived from that primary one. The juristic meaning of the term is closely associated with its linguistic meaning. Oftentimes, one uses the term *rahn* to refer to the object that was pawned to ensure a debt.

Legally, the pawning or mortgage contract is defined<sup>1</sup> as holding an item in lieu of a legal right that may be satisfied from that item. In other words, the contract involves holding a valuable non-fungible good as insurance against a debt, where the non-fungible may be used to extract the value of the debt or part thereof. This contract may be differentiated from the guaranty contract thus: the guaranty contract insures a debt through the liability of a creditworthy individual (the guarantor), while the pawning contract ensures a debt with valuable property. In this regard, since the insuring pawned object must be valued property, impure objects whose impurities cannot be removed are not eligible to serve in this capacity as a pawned object insuring a debt.

The Shāfi‘īs defined the pawning contract thus:<sup>2</sup> “Taking a non-fungible property as insurance against a fungible debt, whereby the debt may be extracted from the held property if it is not repaid”. Their explicit specification of “non-fungible property” as the pawned object implies that usufruct may not be used as the object of a pawning contract, since they are transient and thus

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<sup>1</sup> cAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.5), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.339), Al-Sarakhsī (1st edition (Ḥanafī), vol.21, p.63).

<sup>2</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.121), Al-Sharqāwī ((Shāfi‘ī), vol.2, pp.122,124).



do not provide the required insurance.

The Ḥanbalis defined the contract thus:<sup>3</sup> “A pawned object is a property used as insurance for a debt, so that the debt may be extracted from the property if it is not possible to recollect from the debtor”.

The Mālikīs defined the pawning contract thus:<sup>4</sup> “It is the act of taking a valued property from its owner, as a means of insuring a loan that has matured or is about to mature”. Thus, they allow this contract to include taking non-fungible properties such as real estate, animals, or commodities, as well as usufruct, as pawned objects. In the latter case, pawned usufruct must be tied to a specific time period or task, and must be deducted from the debt. As for the debt itself, they stipulated that it must be matured, e.g. the price in a concluded sale, the repayment of a matured debt, or the value of ruined objects; or it must be about to become matured, e.g. taking an object from an artisan or borrower to ensure against losing one’s capital or lent object. In the latter cases, the pawned object is used as insurance against the value of the objects for which the artisan or borrower is liable.

It is worthwhile to note that the Mālikī use of the phrase “the act of taking” does not necessarily imply actual delivery of the pawned object. In fact, such physical delivery is not required in their school as a condition of conclusion, validity, or bindingness. In this regard, they recognize as concluded, valid, and binding any pawning contract that is concluded with the proper language of offer and acceptance, and the pawn broker may later demand receipt of the pawned object.

## 69.2 General characterization

The pawning contract is a voluntary charitable contract (*tabarruʿ*), since what the pawned object is given without financial compensation.<sup>5</sup> It is also one of the contracts involving non-fungibles, which are not considered totally binding until the object of contract is delivered. The five contracts that share this classification are: gifts, simple loans, deposits, loans, and pawning. In those five contracts, the necessity of delivery to make the contract final follows from the voluntary charitable nature of the contract. In fact, this ruling is formalized as a juristic rule: “voluntary charitable acts are not fully concluded prior to receipt”. As a consequence, such contracts have no effects prior to receipt, and thus all their effects are considered to be derivative of the act of receipt.

## 69.3 Legality

There are proofs of legality of the pawning contract in the Qur’ān, the Sunnah, and consensus:

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<sup>3</sup>Ibn Qudāmah (, vol.4, p.326).

<sup>4</sup>Al-Dardīr ((Mālikī)B, vol.3, p.303 onwards, 325).

<sup>5</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.340).



- Proof from the Qur'ān is provided by the verse “If you are on a journey and cannot find a scribe, then use the receipt of pawned objects” [2:283] [as an act of insurance, instead of the proscribed documentation]. Based on this verse, only Mujāhid and the Zāhirīs restricted pawning to the state of traveling, while most jurists agreed that taking pawned objects is permissible both at home and while traveling, based on the Prophet's Sunnah which allowed it unconditionally.<sup>6</sup> In this regard, the Qur'anic verse mentioned the state of travel to alert people that there is an easy means of documenting and insuring a debt if there is no scribe at hand.
- Proof from the Sunnah is provided by the Ḥadīth narrated by Al-Bukhārī on the authority of 'A'ishā (mAbpwh) that “The Prophet (pbuh) bought some food from a Jew, and he pawned his iron shield with him”.<sup>7</sup> In another Ḥadīth, Anas (mAbpwh) said: “The Prophet (pbuh) pawned a shield with a Jew in Madīnah, and he took from him some barley for his family”.<sup>8</sup>

In another narration on the authority of 'Abū Hurayrah, the Prophet (pbuh) was narrated to have often said: “pawned riding animals may be mounted in exchange for their expenses, and the milk of pawned dairy animals in exchange for their expenses; and the one who rides or drinks is thus responsible for the animal's expenses”.<sup>9</sup>

In another narration on the authority of 'Abū Hurayrah, it is reported that the Prophet (pbuh) said: “The ownership link between a pawned object and its owner is not severed; he is still responsible for its expenses, and he is entitled to its output”.<sup>10</sup> This Ḥadīth negated the common pre-Islamic practice of assigning ownership rights to the pawn-broker if the debtor does not repay in the specified time period. However, the Legislator has thus negated that practice, since the wisdom behind legalizing pawning is to ensure debts against default, just like guaranties ensure them. Such insurance of debts with pawned properties makes it easier to extend credit, thus benefiting the debtor. Pawning also benefits the creditor by giving him primacy over other creditors through possession of the pawned object from which he has the first right to extract what is owed to him.

- Muslims have also reached a consensus that pawning is permissible.

Pawning is one of the most powerful means of ensuring against default. In this regard, documentation and guaranty provide les certain insurance of the

<sup>6</sup>Ibn Qudāmah (, vol.4, p.327), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.305), Al-Kāsānī ((Ḥanafī), vol.6, p.135), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.271), 'Ibn Juzayy ((Mālikī), p.323), 'Ibn Hubayrah ((Ḥanbalī), vol.1, p.238), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.307 onwards).

<sup>7</sup>This Ḥadīth and the next one may be found in Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.319 onwards), Al-Shawkānī (, vol.5, p.233 onwards).

<sup>8</sup>Narrated by 'Aḥmad, Al-Bukhārī, Al-Nasā'ī, and 'Ibn Mājah.

<sup>9</sup>Narrated by the major narrators of Ḥadīth with the exception of Muslim and Al-Nasā'ī, c.f. Al-Shawkānī (, vol.5, p.234).

<sup>10</sup>Narrated by Al-Shāfi'ī and Al-Dāraqūṭnī.



creditor's right compared to a pawned object that he holds in his possession, and which he may sell to collect what the debtor owes him with the permission of a judge or the object's owner. As we have previously mentioned, pawning also benefits the debtor by making it possible for him to receive credit through a loan or price deferment. Thus, this contract is beneficial to both parties.

## 69.4 Non-bindingness

Jurists agree that pawning as a means of insuring a debt is permissible but not required. In this regard, pawning is a means of documenting and insuring a debt, similar to guaranty, and neither is required. Thus, the verse's [2:283] instruction to collect pawned objects if scribes are not found is understood to be guidance to the believers, and not an order. As proof of this interpretation, one may cite the continuation of the verse [2:283] "If you trust one another, then let the trusted party deliver that with which he was entrusted". In addition, Allāh (swt) ordered the use of pawned objects in the absence of scribes, but it can be inferred from the "trust" continuation of [2:283] that documenting the debt itself is not required, and thus its replacement is not required either.<sup>11</sup>

## 69.5 Cornerstones and components

The pawning contract has four components: "the debtor (who pawns an object of his), the creditor (who receives the pawned object), the pawned object (as insurance of the debt), and the debt in lieu of which the object is pawned". In this regard, the Ḥanafis stipulated the offer and acceptance from the debtor and creditor, respectively, as the cornerstone of the pawning contract, in analogy to most other contracts.<sup>12</sup> However, the Ḥanafis ruled that the contract is not finalized or binding until the pawned object is delivered either by transportation to the creditor, or by giving him access to it. Thus, the debtor may make an offer along the lines: "I pawn this object with you in lieu of the debt I owe you", and the creditor may indicate his acceptance by saying: "I accept". In this regard, the term "pawn" need not be uttered in the offer, for instance, a buyer may give an object to the seller saying: "keep this until I pay you the price", in which case the pawning contract is concluded, since what matters in contracts is their economic content.

The non-Ḥanafis, on the other hand, stipulated four cornerstones for the pawning contract: contract language, contracting part(ies), pawned object, and underlying debt.<sup>13</sup> This trend for non-Ḥanafī jurists to stipulate more cornerstones than their Ḥanafī counterparts is quite common in all contracts. This

<sup>11</sup> Ibn Qudāmah (, vol.4, p.327), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.307).

<sup>12</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.135), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.340), 'Ibn ʿĀbidīn ((Ḥanafī), vol.8, p.189 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.63), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.54).

<sup>13</sup> Al-Dardīr ((Mālikī)B, vol.3, p.304 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.121), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.307 onwards).



follows from the Ḥanafī definition of a cornerstone as: “Part of something, the existence of which is predicated on that part”. In this regard, there may be parts upon which existence is predicated, and others upon which it is not. On the other hand, non-Ḥanafī jurists define a cornerstone thus: “Something upon which the existence of the thing is predicated, and without which the thing may not be imagined”, whether or not it is a part of the thing. Thus, the contracting party is considered by the non-Ḥanafīs as a cornerstone, since it is impossible to imagine a contract without contracting parties. However, the contracting party is not a part of the contract, and thus the Ḥanafīs list such parties as conditions of contracts rather than cornerstones.

## 69.6 Forms of pawning

A pawning may exist in one of three forms:<sup>14</sup>

1. A pawning may originate with the debt-generating contract. For instance, a seller in a credit sale may stipulate a condition that the buyer must pawn an object in lieu of the price established as a debt. All jurists render such pawning valid, since they recognize that it serves a valuable economic purpose.
2. A pawning may originate after the debt is established. Jurists also agree that this form of pawning is valid, as a means of insuring an existing debt, in a manner similar to the guaranty contract. In this regard, they refer to the verse [2:283] regarding taking pawned objects to insure debts, as a substitute for written documentation, which normally takes place after the establishment of the debt.
3. A pawning may also be originated prior to establishment of a debt. For instance, a person may pawn some of his property with another ahead of getting a loan from that person. This form is valid for the Mālikīs and Ḥanafīs, since they view pawning as insurance of a legal right, which may thus be provided prior to the establishment of that right, in analogy to guaranty. This, indeed, is the most logical conclusion.

On the other hand, the Shāfi‘īs and most of the Ḥanbalīs ruled that such a form of pre-pawning is not valid. They based their ruling on the view that insurance of a legal right may not precede its establishment, in analogy to testimony. Thus, they argued that since pawning is derivative of a legal right, it may not precede it.

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<sup>14</sup>Ibn Qudāmah (, vol.4, p.327), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.127), ‘Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.305), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.308), Al-Dardīr ((Mālikī)A, vol.3, p.245).



## Chapter 70

# Pawning Conditions

The pawning contract has conditions for conclusion, conditions for validity, and one bindingness condition (which is receipt of the pawned object). In what follows, we shall list the contract conditions by its components (contracting parties, contract language, etc.).

### 70.1 Contracting party conditions

The two parties to a pawning contract (the debtor and creditor) must satisfy the following conditions:<sup>1</sup>

#### 70.1.1 Eligibility

The Ḥanafīs and Mālikīs stipulated that eligibility for pawning is the same as eligibility for sales. Thus, since pawning is a financial dealing similar to sales, whoever is deemed to be eligible for sales is deemed to be eligible for pawning. Thus, the two parties to a pawning contract must be sane, and discerning, invalidating pawning by insane individuals or non-discerning children. Moreover, being of legal age is not a condition for pawning, provided that the contracting party is a boy who is permitted to engage in trade. In the case of a discerning child, or a mentally incompetent person, a pawning would be valid but suspended on the permission of his guardian.

For Shāfiʿīs and Ḥanbalīs, eligibility conditions for pawning are the same as those for trading or making charitable contributions. They based this view on the fact that pawning is a non-required voluntary action, which is thus invalid if the actor is coerced, not of legal age, insane, mentally incompetent, or bankrupt. Moreover, pawning of a child's or mentally incompetent person's property is not valid if initiated by a father, grandfather, legal guardian, or judge, except

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.135), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.268), Al-Sharqāwī ((Shāfiʿī), vol.2, p.123), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.309), Al-Dardīr ((Mālikī)A, vol.3, pp.231 onwards, 292).



in cases of necessity and apparent benefit to the legally restrained individual. For instance, pawning a child's property to borrow foodstuffs to be repaid from an anticipated crop, debt repayment, or improvement in market conditions, is permissible. Similarly, it is permissible for take pawned objects as insurance against an extended loan or an item sold on credit due to a necessity such as fear of theft, etc.

An example of beneficial pawning on behalf of a legally restrained individual would be pawning an item that is worth \$100 as insurance for an item which was bought for a deferred price of \$100, but which is worth \$200 at the time of pawning. Similarly, collecting a pawned item that is worth more than the deferred price in a credit sale would be clearly beneficial to the young creditor.

In this regard, a legal guardian or plenipotentiary may only pawn a child's object to a creditworthy and rich individual, and he should have eyewitnesses to the contract. Moreover, he should only engage in such pawning for periods of time that are customarily considered short. Otherwise, if any of those conditions are violated, the pawning is not permissible.<sup>2</sup> For instance, it is not permissible for a legal guardian or plenipotentiary to pawn the property of a child as insurance for a debt owed by both of them to a third party, since that is not of benefit to the child.

The Ḥanbalīs expressed this legal ruling in the form of two conditions: (i) that the pawn-broker is trustworthy, and (ii) that the child benefits from the pawning through receiving funds or clothing, or through the maintenance of his property or livestock.<sup>3</sup>

On the other hand, they allow a father to pawn his objects to his son and his son's property to himself. For the Shāfi'īs, those transactions are also valid for a grandfather, since they view fathers and grandfathers as equal in their affection and concern for their children and grandchildren.

### Guardian and plenipotentiary pawning

There are three forms that we need to consider for the Ḥanafī rulings on a guardian's or plenipotentiary's pawning of the property of a young child: (1) a child's property may be pawned in lieu of a debt on the child, or (2) in lieu of a debt of the guardian or plenipotentiary; and (3) the status of the pawned object from the child's point of view once he reaches legal age.<sup>4</sup> We have already discussed the non-Ḥanafī rulings in this regard immediately preceding the current discussion.

#### 1. Pawning in lieu of a child's or insane person's debt

It is permissible for a guardian or plenipotentiary to pawn the property of a mentally incompetent person (either a young child or an insane person) to

<sup>2</sup>Al-Sharqāwī ((Shāfi'ī), vol.2, p.123), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.122).

<sup>3</sup>Ibn Qudāmah (, vol.4, p.359), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.319).

<sup>4</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.72 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.209 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.352,364).



ensure that person's debts that were established to feed or clothe him, or to trade in his property. In the former case, incurring the incompetent person to meet his feeding and clothing needs is permissible, and in the latter case, trading in his property is necessary to make it grow. In this regard, since pawning is a contract used to ensure the rights of the creditor, it is permissible in those circumstances where debt establishment is valid.

If the guardian was the debtor child's father or grandfather, or if the same person served as a guardian for both the creditor and the debtor, then he may play both roles in the pawning contract. In such contracts, he serves as a pawning party on behalf of the child, and as pawn broker on behalf of himself or the creditor. In such cases, since the guardian's concern for the benefits of the child are uncontested, he may take both positions for the creditor and debtor, in analogy to the permissibility of selling the child's property to himself.

However, the preceding is not permissible for a judge or plenipotentiary, whose concern for the child's well-being is not as certain as that of a father. In contrast to the father, their role in such contracts would be construed as sheer agencies, wherein the agent may not take two sides of a sale or pawning contract.

## 2. Pawning in lieu of a debt of the guardian's

'Abū Ḥanīfa and Muḥammad ruled based on juristic approbation (*istiḥsān*) that a father, grandfather, or plenipotentiary may pawn a property of the child's in lieu of a debt that he himself owes. They based this ruling on the permissibility for such properties to deposit the child's property. In this regard, pawning is more eligible for permissibility, since a pawn-broker guarantees the pawned object against any loss or destruction, while a depositary guarantees a deposit against such events only as long as he is neither negligent nor transgressing against the property.

On the other hand, 'Abū Yūsuf and Zufar ruled on the basis of ruling by analogy that a guardian or plenipotentiary is not allowed to pawn the property of a child in lieu of a debt that they themselves owe. They ruled thus by classifying the pawning of the child's property in lieu of their own debts as a form of repaying their debts out of his property, which repayment is not permitted.

If we accept the first ruling by juristic approbation, and then the pawned object was destroyed while held by the creditor, the guardian (e.g. father or grandfather) must guarantee for the child only the lesser of the debt and the value of the pawned property.

However, a plenipotentiary must guarantee the full value of the pawned property. The difference between the two cases is the permissibility for a father or grandfather to use the child's property for his own benefit, while the plenipotentiary is not permitted to use his property thus.

Similarly, a father or grandfather may pawn his own property to a young child in lieu of a debt that he owes him. In this case, he would set the pawned property aside for the benefit of the young child. However, such pawning is not



permissible for a plenipotentary.

Also, a father or grandfather may pawn the young child's property with himself in lieu of a debt the child owes him, since he is permitted to take both sides of such contracts due to the establishment of his concern for the child's benefit. Thus, such guardians may issue both offers and acceptances in such contracts with their young child, in analogy to the permissibility of trading with him. A plenipotentary, on the other hand, is a sheer agent in all such contracts as we have seen, and thus may not take both positions of contracts that may result in financial benefits or losses to the child.

### 3. When the child reaches legal age

In all of the above, once a child reaches legal age, or the reason for mental incompetence or legal restraint is removed, he may not invalidate an established pawning, and may only collect the pawned object upon debt repayment. In this regard, the transactions of the eligible guardian are executable and binding, regardless of whether the underlying debt was established as a liability on the child, the guardian, or both.

However, if a debt on the guardian is collected from the child's pawned property, or if the pawned object perishes prior to recollection, the child may seek compensation for his due right from the guardian once he reaches legal age, whether the guardian is still alive or dead. In this case, the ruling is similar to the case of a lent item that is pawned by the borrower in lieu of a debt that he owes to a third party. In this case, the lender may recollect his pawned property by paying the borrower's debt, and then he may seek recollection of the debt he repaid from the borrower.

### Multiple transacting parties

The number of pawning individuals, or the number of pawn-brokers, may be more than one. The Ḥanafis rule that such pawning from or to multiple parties is permissible based on the absence of property right sharing rules that invalidate the pawning contract.<sup>5</sup> In the case of multiple pawning parties, the pawned object is received by the creditor without establishing common ownership, and thus the contract status is the same as that of a single pawning agent. On the other hand, in the case of multiple pawn-brokers, the entire pawned object is tied to the debt by a single contract. In this regard, holding the pawned object in lieu of the debt cannot be divided, and hence the non-fungible object is considered to be held thus simultaneously by all creditors without division, rendering the contract valid.

This is in contrast to the case of giving a gift to multiple recipients, which is rendered by 'Abū Ḥanīfa to be impermissible. His ruling in the latter case is that the intention of a gift is to establish ownership of the recipient. Since

<sup>5</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.78 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.354 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.218 onwards), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.63 onwards).



the multiple recipients may not each have full and independent ownership of the gift, the stipulated situation requires dividing the gift ownership among the recipients.

In what follows, we list some of the specific Ḥanafī rulings pertaining to different transacting parties:

- In the case of multiple pawning subjects, the pawning is considered valid in lieu of the entire debt. In this case, the single pawn broker may hold the pawned object until he collects the entire debt from the multiple pawning individuals. Thus, if one of the debtors repays his portion of the debt, he may not collect any part of the pawned object, lest he may division the contract for the pawn-broker who is entitled to hold the entire pawned object as insurance for full repayment.

In contrast, the Shāfiʿīs ruled that if one of the debtors repays his part of the debt, a proportional part of the pawned object must be released by the creditor. Thus, they do not allow the creditor to keep the entire pawned object until he recollects the rest of the debt.

- In the case of multiple creditors as pawn-broker, the entire pawned object is considered to be held by each of them in lieu of his debt. Thus, as long as the debtor does not repay all of his debts, the object must continue to be held in pawning. For instance, if the debtor repays one of two creditors fully, the object would thus be considered to be held entirely in pawning with the second creditor. This ruling follows from the above-listed view that the entire pawned object is considered to be held simultaneously by all creditors, without any division.

In this regard, if the object pawned to two creditors is divisible, then each of them may hold half of it. Then, if one of the two creditors allows the other to hold the entire divisible pawned object, 'Abū Ḥanīfa ruled that the holder must guarantee half to the other, while 'Abū Yūsuf and Muḥammad ruled that he must not. On the other hand, if the pawned object is indivisible, then the two creditors may share in its holding by alternating holding periods. In this case, the holder of the pawned object is considered to be a legal representative of the other in that holding.

In contrast, the Shāfiʿīs ruled that if the debtor repays one of his creditors, the corresponding proportion of the pawned object must be released from pawning. In this regard, if a debtor were to pawn two cars to two creditors in lieu of two debts, without explicitly specifying which car is pawned for which debt, then he is not permitted to recollect one of the pawned cars by repaying one of the creditors without paying the other. However, if he explicitly pawns one car for each of the debts, then the contract is in effect two separate contracts, and he may collect one of the cars if he repays one of the debts.

If an indivisible pawned object perishes in the possession of the multiple creditors, each of the creditors is considered to have been repaid his portion



of the debt from the pawned object. This follows from the fact that recollecting one's credit from the object is in fact divisible. In this regard, if the debtor had repaid one of his creditors prior to the perishing of his pawned property, he may recollect whatever he repaid. This follows from the fact that the pawned object is considered a liability on both creditors, and each creditor is considered to be a legal representative of the other in the holding.

## 70.2 Contract language conditions

The Ḥanafīs ruled that a pawning contract may neither be suspended by any condition, nor deferred to a future date.<sup>6</sup> In this regard, they argued that the pawning contract is similar to the sales contract, since it is a means of debt repayment, which may neither be suspended by a condition nor deferred. Thus, if a pawning is suspended pending a condition or deferred to a future debt, they render it defective in analogy to suspended or deferred sales contracts.<sup>7</sup>

If a pawning contract includes a defective or invalid condition, the pawning is deemed valid, and the condition is invalidated. This ruling follows from the fact that pawning is not a commutative financial contract. Thus, it was stated in *Al-Ziyādāt* and *Al-Bizāziyya*: “A pawning is not invalidated by defective conditions. This ruling follows since a pawning is similar to gifts in that it does not require the pawn-broker to pay anything in return for keeping the pawned object in his possession”.

On the other hand, it was stated in *Al-Kāsānī* ((Ḥanafī), vol.6, p.140), that a pawning is rendered invalid by the inclusion of defective conditions, in analogy to sales and in contrast to gifts. However, I think that the previous opinion of *Al-Ziyādāt* and *Al-Bizāziyya* is the correct one, since pawning is not a commutative financial contract, whereby the contract is valid even if the debt is dropped if the pawned object perishes. In this regard, it was stated in *Al-Hidāya* that: “The pawning contract is a voluntary contribution contract, since the pawn-broker need not give anything in exchange for the pawned object”.<sup>8</sup>

The non-Ḥanafī jurists classified conditions in a pawning contract into valid conditions and defective conditions. They further classified defective conditions into those that render the contract defective, and those that are considered nugatory and leave the contract valid and intact. In what follows, we shall list those conditions and classifications by juristic school:

- The Shāfi'īs listed three types of conditions in pawning contracts:<sup>9</sup>

1. Valid conditions: Under this category, they list all conditions that are implied by the pawning contract, e.g. giving priority to the pawn-

<sup>6</sup> *Al-Kāsānī* ((Ḥanafī), vol.6, p.135).

<sup>7</sup> *Ibn 'Ābidīn* ((Ḥanafī), vol.5, pp.374,357), wherein it is stated that “deferment of a pawning renders it defective”.

<sup>8</sup> *Ibn Al-Humām* ((Ḥanafī), vol.8, p.190).

<sup>9</sup> *Al-Khaṭīb Al-Shirbīnī* ((Shāfi'ī), vol.2, p.121 onwards), 'Abū-'Ishāq *Al-Shīrāzī* ((Shāfi'ī), vol.1, pp.310-2), *Al-Ramlī* ((Shāfi'ī), vol.3, p.254 onwards).



broker over other creditors in collecting his credit from the pawned object. They also stated that valid conditions must be of benefit to the contract, and must not lead to any uncertainty, e.g. securing witnesses. Such conditions render both the contract and the condition valid, as they do for sales contracts.

2. Nugatory conditions: Under this category, they list all conditions that do not serve any beneficial purpose, e.g. that a pawned animal is not fed a certain type of animal feed. Such conditions are voided and invalidated, but the contract is deemed valid.
3. Conditions that render the contract defective: Conditions that harm the pawn broker render the pawning contract defective. Examples of such harmful conditions include: a condition that the pawn-broker may not sell the pawned item except one month after the debt is due but unpaid, or a condition that puts a ceiling on the price at which the pawned item may be sold. Similarly, conditions that harm the debtor and benefit the pawn-broker render the pawning defective. Examples of such conditions include: a condition that the pawn-broker may extract usufruct for an unspecified period without compensation, or a condition that grants the pawn-broker rights to any growth in the pawned object. Such conditions are voided due to uncertainty and non-existence at the initiation of the contract, and based on the Ḥadīth: “Any condition that is not listed in the Book of Allāh is invalid”.<sup>10</sup> Moreover, the majority of Shāfi‘is rule in this case that the contract itself is deemed invalid, since such conditions are contrary to the implications of the contract, whether they harm the debtor or the creditor in the pawning.

The Shāfi‘is also ruled that the condition and the contract are deemed invalid if a condition is stipulated that increases in the pawned object are considered to be pawned themselves. Examples of such increases include wool on the back of pawned sheep, fruits on pawned trees, or the offspring of a pawned animal. All such increases were not in existence at contract inception, and involve significant uncertainty, and thus the condition and the contract are rendered invalid if such a condition is stipulated.

Most Shāfi‘is also ruled that a pawning contract is deemed defective if it is deferred to a future date or suspended pending a condition.

Thus, we may conclude that two types of conditions are deemed defective: (i) those that harm one of the contracting parties, and (ii) those that involve uncertainty. It is also clear that most Shāfi‘is ruled that a defective condition renders the contract defective.

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<sup>10</sup>Narrated by Al-Bukhārī and Muslim on the authority of ‘A’ishā as follows: “Any condition that is not in the Book of Allāh is invalid. Even if there were one hundred conditions [in a contract], the rights of Allāh are more worthy of fulfillment, and the conditions of Allāh are firmer”, c.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.10).



- The Mālikīs ruled that any condition that does not contradict the implications of the contract, or result in a forbidden transaction, is deemed valid. They further ruled that any condition that contradicts the implications of the contract are defective, and thus render the pawning contract invalid. Examples of such defective conditions include: a condition that the pawned object is kept with the debtor instead of delivery to the creditor, a condition that the pawned object is not to be sold after the debt reaches maturity without being paid, or a condition that the debtor must approve the price at which the pawned object is sold.

The most notable forbidden condition that voids the pawning contract is the condition that if the debt is not repaid at or before maturity, the pawned object becomes the property of the creditor/pawn-broker. This prohibited condition voids the pawning contract based on the Ḥadīth: “The pawned object does not become property of the creditor if the debt is not paid on time”.<sup>11</sup>

In summary, the Mālikīs classified conditions in pawning contracts into two categories only: valid and defective.

- The Ḥanbalī agreed with the Mālikīs in classifying all conditions in pawning contracts into valid ones and defective ones.<sup>12</sup>

For both schools, valid conditions are those that reinforce the contract, do not contradict its implications, and do not result in a forbidden transaction. Examples of valid conditions include: conditions that the pawn-brokers must be of good character and trustworthy, or conditions that such pawn-brokers may sell the pawned property if the debt is not repaid at maturity.

In contrast, defective conditions are those that contradict the implications of the contract. Examples include: conditions that the pawned object may not be sold if the debt is unpaid at maturity, conditions that the creditor may not collect his credit from the pawned object, conditions that the pawned object may not be sold if it is subject to perishing, conditions that it may only be sold at a pre-specified price or only at a price that is accepted by the debtor. All such conditions make it more rather than less difficult to repay a debt, which is contrary to the purpose of the pawning contract.

Other examples of defective conditions in pawning include: giving the debtor an option, making the pawning non-binding on the debtor, timing the pawning with a fixed period, requiring that the debtor hold the pawned object, requiring that the debtor or the creditor may use the pawned object, or considering the pawn-broker as a guarantor of the pawned object.

<sup>11</sup>We have explained this Ḥadīth previously. It refers to the pre-Islamic practice, whereby a pawn-broker was given ownership of the pawned object if the debtor did not pay his debt, which was forbidden in Islam, c.f. *Al-Nihāyah fī Ḡharīb Al-Ḥadīth* by 'Ibn Al-'Athīr (vol.3, p.379).

<sup>12</sup>'Ibn Qudāmah (, vol.4, pp.381-3), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.309).



Another defective condition is the one by means of which the pawn-broker is given ownership of the pawned object if the debt is not paid at maturity, as if the pawned object is traded for the matured debt. Moreover, any suspension of a pawning contract pending a condition is defective, in analogy to the ruling regarding such suspension in sales contracts.

Ḥanbalīs differed in opinion regarding whether or not a defective condition renders the pawning contract defective. Thus, the Justice 'Abū Ya'cālā ruled that it is possible for a pawning contract to be rendered defective if it contains such defective conditions. He based this ruling on the view that the debtor only accepted to give his property to the creditor if the stipulated condition holds. Thus, if the condition is invalidated due to being defective, consent of the contracting parties is not longer satisfied, and the contract is rendered invalid.

The majority of Ḥanbalī jurists agreed that timing conditions in pawning contracts (e.g. pawning for a day, or on alternating days) render the pawning defective. However, they differed over other types of defective conditions:

- Some Ḥanbalī jurists ruled that all defective conditions render the pawning contract defective.
- However, 'Abū Al-Khaṭṭāb and other Ḥanbalīs ruled that those other defective conditions do not render the pawning contract defective. He based his ruling on the Ḥadīth: “The pawned object does not become property of the creditor if the debt is not paid on time”, which relates to a pawning contract with a stipulated defective conditions but did not render the contract itself defective. In this case, he argued that the debtor would have accepted the pawning with this condition, and therefore he would have certainly accepted it without it.
- Some Ḥanbalīs argued that any defective condition that harms the creditor renders the pawning defective, while those that do not harm the creditor may or may not render it thus.
- The accepted opinion among later Ḥanbalīs agrees with what was stated in item #962 of the *Majallat Al-Aḥkām Al-Shar'īyyah*: “The pawning contract is not rendered defective if it contains a defective condition. Rather, the condition is rendered nugatory”.

## 70.3 Underlying debt conditions

The Ḥanafīs stipulated the following three conditions for the underlying debt or legal right in lieu of which a pawned object is given:

### 70.3.1 First Ḥanafī condition

The underlying right in lieu of which an object is pawned must be binding and matured as a liability on the debtor. Thus, if the underlying debt was not



due, there is no point in giving a pawned object as insurance for its repayment. Thus, they ruled that the request to ensure the creditor's right (through pawning) cannot be justified without a binding right to be thus ensured.<sup>13</sup> The Ḥanafis expressed this condition by requiring the underlying right ensured by the pawning contract to be "a guaranteed debt".<sup>14</sup> In other words, the underlying right must be a matured debt that is established as a liability on the debtor. Our statement is clearer, since the underlying right may either be a [fungible] debt, or it may be a non-fungible object that must be delivered to the creditor:

1. If the underlying right in lieu of which a property is pawned is a matured debt, then the pawning is valid regardless of how that debt was established (e.g. through a loan, a sale, ruining the property of another, or usurping the property of others). This follows since all such debts must be repaid, and thus pawning a property to ensure such repayment is meaningful.

In this regard, most Ḥanafis agreed that the pawning is valid whether the established debt may be exchanged prior to receipt (like most debts), or may not (e.g. the capital of a *salam* contract, one side of a currency exchange contract, or the object of a *salam* contract). This, indeed was the opinion of 'Abū Ḥanīfa, Muḥammad, and 'Abū Yūsuf.

On the other hand, Zufar ruled that debts that may not be exchanged prior to receipt are not eligible as underlying rights in lieu of which a pawning may take place. He based his ruling on the argument that an integral component of a pawning contract is dropping the debt if the pawned object were to perish in the creditor's possession. This dropping of the underlying debt is in fact an exchange of the perished pawned object for the debt, but that is not allowed for the specified non-exchangeable debts, by definition. In fact, we have pointed out this legal problem in our study of the *salam* contract. Were it permissible to base a pawning on such debts, the debts would be exchangeable prior to receipt for the pawned object if it perishes, but that would result in a legal contradiction, which we do not allow. In this regard, we may not avoid treating this case as a forbidden exchange of such debts by arguing that the debt was thus repaid when the pawned object perished, since repayment must be made of the same genus as the established debt.

The majority of Ḥanafis, however, defended their view by arguing that in all pawning contracts, the debt is dropped if the pawned object perishes in the creditor's possession as a form of repayment not as a form of exchange. In this regard, they argued that the pawned object and the established debt share the necessary genus of being valued properties, even if they do not share the same genus in other respects. In this regard, they argued that having the same genus in the more general sense of being a property

<sup>13</sup>See lecture-notes on pawning by Professor Sheikh <sup>c</sup>Alī Al-Kḥafīf (p.45).

<sup>14</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.142 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, pp. 196, 206 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.66), <sup>c</sup>Abd Al-Gḥanī Al-Maydānī ((Ḥanafī), vol.2, p.55 onwards), 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, p.350).



may be sufficient if need or necessity may require it, in analogy to the case where a person destroys a property for which there is no equal in genus in the specific sense.<sup>15</sup> In such cases, they further argue that the need or necessity that legitimized the pawning contract would have been satisfied, and such needs to ensure debt repayment exists for all types of debts, exchangeable or otherwise.<sup>16</sup>

The non-Ḥanafis had a number of opinions in this regard.<sup>17</sup> Thus, there are two opposite reported opinions of 'Imām 'Aḥmad regarding the debt of the seller in a *salam* contract. One such report permits pawning an object in lieu of that debt, and another does not permit it. The first report suggests that if an object is pawned in lieu of liability for the object of *salam*, and then the contract is voided, the pawning is considered to be invalidated due to the non-existence of its underlying debt. In this case, the seller in the *salam* contract must return the received price to the buyer immediately.

'Imām Mālik and the Shāfi'is ruled that pawning in lieu of one side of a currency exchange program, or the price of a *salam* contract established as a liability on the buyer, is not permissible since receipt is required during the contract session of such contracts. However, they permitted pawning in lieu of the object of *salam* that is established as a debt on the seller, since it qualifies as one of the debts for which pawning was allowed in the Qur'ān.

2. If the underlying liability for which an object is pawned is non-fungible, we need to consider multiple cases:

- If the object is held in a possession of trust (e.g. a deposit, a lent object, a leased object, or the capital of a partnership or silent partnership), then jurists agree that it may not be used as an underlying

<sup>15</sup>Such cases are considered repayments, which do not require consent of the repaid party, rather than exchanges which require the repaid party's consent.

<sup>16</sup>If a pawned object given in lieu of the capital of a *salam* contract, or in lieu of one side of a currency exchange contract, were to perish during the contract session, the contract is thus deemed valid. In this case, the party that received the pawned object is considered to be paid his due during the contract session, as required by the conditions of those two contracts. However, if the pawned object were to perish after the contract session, the contract would be rendered invalid, since receipt did not take place during the session of a *salam* or *ṣarf* contract, as required. If an object is pawned in lieu of the liability for the object of *salam*, and then it perishes prior to delivery, it is cancelled against the lesser of its value and the value of the object of *salam*. If a *salam* contract is voided after pawning an object in lieu of the liability for its object, the ruling by juristic approbation renders the object pawned in lieu of the capital of *salam*, since the latter is a compensation for the object of *salam*. However, if the pawned object were to perish after the contract is voided, it is cancelled against the object of *salam* rather than its price. This ruling follows from the fact that the pawning was initiated in lieu of liability for the object of *salam*, and thus is cancelled against it, despite the fact that it was held afterwards in lieu of another liability, c.f. 'Ibn Al-Humām ((Ḥanafī), vol.8, p.207).

<sup>17</sup>'Ibn Rushd Al-Ḥafid ((Mālikī), vol.1, p.269 onwards), 'Ibn Juzayy ((Mālikī), p.323), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.127), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.305), 'Abu Al-Barakāt ((Ḥanbalī), vol.1, p.335).



liability for pawning. This ruling follows from the fact that receipt of a pawned object is a receipt of guaranty, which must thus correspond to a non-guaranteed item. Thus, the general rule is that no pawning is permitted except in lieu of liability for a guaranteed item, so that receipt of the pawned object may make debt repayment easier.

- The non-fungible object may be guaranteed by itself (i.e. must be replaced by an equal if it has one, or its value otherwise), e.g. if in the possession of a usurper, the buyer prior to concluding the sale, the dowry prior to consummating a sale, if it is compensation for seeking divorce in the possession of the wife, or if it is compensation to the family of a killed person. The Ḥanafīs ruled that liabilities for such non-fungibles are eligible as underlying liabilities in a pawning contract. In such cases, the creditor is permitted to hold the pawned object until he collects the owed non-fungible. If the pawned object perishes in the possession of the creditor prior to collecting his non-fungible, while the latter is in good condition, the debtor must thus deliver the non-fungible he owes, and collect the lesser of the value of the pawned object and the value of the non-fungible he owed. This rule follows since the pawned object was guaranteed by the lesser of those two values.

The Mālikīs and Ḥanafīs also permitted pawning in lieu of liabilities for such non-fungibles that are guaranteed by themselves.<sup>18</sup>

In contrast, the Shāfiʿīs did not permit pawning in lieu of a liability for a non-fungible that is held in a possession of trust or guaranty.<sup>19</sup> This ruling is based on restrictions of underlying liabilities for pawning to be fungible debts (*dayn*). Their proof is that Allāh (swt) only mentioned pawning in such debts, and thus they argued that legality of pawning is not established in lieu of other liabilities. Moreover, they argued that non-fungibles may not be taken out of the price of a pawned object, and thus contradicts the purpose of pawning in sales.<sup>20</sup>

- If the non-fungible is guaranteed by another (e.g. the object of sale in the seller's possession which is guaranteed by the price, whereby liability for the price is dropped if the object of sale perishes in the seller's possession), then the Ḥanafīs agree that liabilities for such non-fungibles are not eligible to be underlying a pawning contract. In this regard, it is narrated that 'Abū Ḥanīfa based this ruling on the view that pawned objects' receipt is a form of debt repayment. In this regard, receipt cannot be established in lieu of a non-fungible

<sup>18</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.270), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.311).

<sup>19</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.126), Al-Ramlī ((Shāfiʿī), vol.3, p.265), 'Abū-'Ishāq Al-Shirāzī ((Shāfiʿī), vol.1, p.305).

<sup>20</sup>Thus, we can see that the common practice of establishing a book as a mortmain with a condition not to lend it or take it out of its place unless an object is pawned as insurance, c.f. Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.59).



liability that is guaranteed by another. As proof, he argued that if the pawned object were to perish in the possession of the creditor in this case, the debt would not be deemed to be repaid.

However, the more reasonable ruling is that pawning is permissible in lieu of liability for the object of a sale, since it is guaranteed by the seller. In this case, the buyer may hold the pawned object until he receives the sold object. Thus, repayment of the debt is in fact accomplished in reality, since the object of sale is either guaranteed by its value or its price, and dropping the price if the object perishes prior to delivery is viewed as a form of financial compensation.

As a consequence of the condition that the underlying debt in a pawning contract must be a matured liability, we list the following rulings:

1. Pawning in lieu of identified monies: If a man marries a woman in exchange for specified monies, or buys an item in exchange for specified monies, and pawns an object in lieu of his liability for those monies, 'Abū Ḥanīfa, 'Abū Yūsuf, and Muḥammad consider this pawning impermissible based on their ruling that monies cannot be made non-fungible through specification. On the other hand, Zufar allowed monies to be made non-fungible through specification, and thus allowed such pawning.
2. Pawning in lieu of a future debt: At face value, our basic condition implies that if the underlying liability is not established, matured, and binding at contract time, the pawning is not valid.

However, the Ḥanafīs and Mālikīs ruled by juristic approbation that pawning in lieu of a promised loan is valid, based on people's needs for such contracts.<sup>21</sup> However, they did not allow pawning in lieu of future debts that were not based on a promise.

The Shāfi'īs and most Ḥanbalīs ruled that it is not valid to pawn an object in lieu of a future debt or liability, whether or not it is promised. Their ruling was based on the view that the liability must be established at the inception of the pawning contract, and the mere promise of lending does not establish such a liability.<sup>22</sup>

3. Pawning in lieu of liability for an object of sale:<sup>23</sup> If a sale contract is concluded, the seller receives the price, and the buyer receives the object of sale, and then the buyer worries that the object of sale may in fact belong to a third party, then he may wish to ask the seller to pawn an object with him as insurance against seeking repayment of the price if the third party

<sup>21</sup> Al-Kāsānī ((Ḥanafī), vol.3, p.143), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.351), Al-Dardīr ((Mālikī)A, vol.3, p.245).

<sup>22</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.127), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.305), 'Ibn Qudāmah (, vol.4, p.328).

<sup>23</sup> The technical term for this type of pawning is *al-rahnu bi-l-darak*, where *al-darak* refers to a buyer who demands repayment of the price if the object of sale is found to belong to another, c.f. continuation of 'Ibn Al-Humām ((Ḥanafī), vol.8, p.206).



repossesses the object of sale. The juristic ruling is that this pawning contract is not valid prior to the actual time of seeking repayment of the price if the third party repossesses the object of sale. This is in contrast to the permissibility of guaranty at such a time. The ruling follows from the fact that repossession of the object by its rightful owner is probabilistic, and thus any pawning thereof would not have an established liability, and may in fact be based on a liability that never comes into existence.

The difference between guaranty and pawning in this case is thus: Guaranty is permissible for future events, since binding promises to do something in the future are permissible, in analogy to pledges (*al-nudhūr*). Thus, the Ḥanafīs permitted guaranties for *darak*, but invalidated pawning for it.<sup>24</sup> In contrast, pawning is intended as a means of debt repayment, and thus requires the existence of a debt to be repaid. Moreover, this repayment aspect of pawning makes it similar to other commutative contracts, which may not be deferred to avoid uncertainty. Indeed, pawning in lieu of *darak*, wherein a seller pawns an object with the buyer saying “if a true owner of the sold object were to appear, you can use this property of mine to collect the price you paid me”, would be similar to such uncertain deferred commutative contracts.

In this regard, the fundamental difference between the case of *darak* and the case of a promised loan is that the former is non-existent while the second is about to exist. Moreover, the Ḥanafī jurists have rendered guaranty of the latter based on need, as we have shown.

### 70.3.2 Second Ḥanafī condition

The Ḥanafīs also stipulated a condition that the pawned object must make it possible for the creditor to extract repayment of his debt. Thus, the pawning is not valid if it cannot serve the purpose of repaying the debt in lieu of which it came into effect, since the very purpose of pawning would thus not be fulfilled.<sup>25</sup> Consequently, the following are not eligible liabilities for a pawning contract:

1. If the underlying liability is the right to take a life, it is impossible to extract that right from any pawned object, and hence the pawning is impermissible. However, if the liability is for financial compensation for a crime (*arsh*), then pawning is valid since the financial compensation can be extracted from a pawned object.
2. Liability to bring a guaranteed person to justice may not be insured through a pawning contract, since the liability cannot be extracted from any pawned object. This extends to the case where one person guarantees to deliver another within a year, otherwise he would have to pay a \$1000

<sup>24</sup> Ibn Al-Humām ((Ḥanafī), vol.8, p.206), Al-Kāsānī ((Ḥanafī), vol.6, p.143 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.350).

<sup>25</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.143 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.208), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.351).



penalty. In this case, the guarantor may not pawn some of his property for the year, since the money is not established as a liability before the year passes, and delivery of the guaranteed person cannot be guaranteed by the pawned property.

3. The right of *shuʿah* is a right of first refusal for the purchase of property in which a person has a right. If a person buys a property or part thereof and then discovers that another has the right of *shuʿah*, delivery of the property becomes a liability on the buyer. In this case, the creditor may not seek a pawned object in lieu of that liability, since the right to buy the property cannot be extracted from the pawned property. Moreover, the buyer of the property to which a right of *shuʿah* is attached does not guarantee that property, i.e. if the property were to perish, he would not be liable in any way.
4. Liabilities for wages paid as compensation for forbidden actions (e.g. to be paid to one who wails at funerals, a female singer or dancer, etc.) is not eligible for pawning contracts. All such contracts of hiring individuals to perform forbidden acts are invalid, and thus the wages are not legally considered as legitimate liabilities, and thus cannot serve as the basis for a pawning.
5. If two individuals lease a property together, and one of them owes the other a portion of the usufruct, that liability cannot be used as a basis for pawning since it cannot be extracted from a pawned object.

### 70.3.3 Third Ḥanafī condition

The liability underlying a pawning contract must be known to all parties. Thus, the pawning is deemed invalid if there is any uncertainty, e.g. if the debtor pawns one object for an unnamed debt out of two that are owed to the creditor.

### 70.3.4 Shāfiʿī and Ḥanbalī conditions

The Shāfiʿīs and Ḥanbalīs stipulated three conditions that the liability underlying a pawning contract must satisfy:<sup>26</sup>

1. The liability must be an established and matured fungible debt. Examples of such debts include: loans to be repaid, the value of a ruined object, and work to be performed in a joint hiring contract. In all such cases, the pawned object may be sold to collect the financial debt, or to hire another worker to perform the task. This ruling regarding the object of a hiring contract disagrees with the ruling of the Ḥanafī school. On the other hand, all three schools agree that liability for a non-fungible object of a

<sup>26</sup>Al-Ramlī ((Shāfiʿī), vol.3, p.264), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.126 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.60), Al-Buhārī (3rd printing (Ḥanbalī), vol.3, p.311).



lease contract may not be used as a basis for pawning, since the liability may not be extracted from the pawned object.

This requirement of fungibility implies that Shāfi'īs do not allow pawning based on liabilities for borrowed or usurped non-fungibles.

The Ḥanbalīs allowed pawning a property in lieu of a guaranteed non-fungible (such as the object of a simple loan, a usurped object, an object received by the buyer prior to concluding the sale, or the received object of a defective contract). The Ḥanbalīs based this ruling on the basis of the rule that pawning is allowed in lieu of any matured debt, or any debt that is about to be matured (e.g. the price of a sale during an option period).

In contrast to the Ḥanafīs, the Shāfi'īs and Ḥanbalīs ruled that promised loans may not be used as a foundation for a pawning contract.

However, they did not differentiate between finally established loans (*al-dayn al-mustaḡirr*, such as those established by loans and received objects of sale), and those that are not finally established (such as liability for the price prior to receiving the merchandise, liabilities for rent prior to extracting usufruct, or liability for a dowry prior to consummation of a marriage). In this regard, wages payable to a worker hired to perform a given task are due during the contract session (like the price in a *salam* sale) and thus may not be the basis of a pawning since it cannot be established as a liability.

2. The debt must be matured or about to be matured. Thus, it is permissible to base a pawning on the liability for the price of a binding sale, or during the option period before it becomes binding. In the latter case, the contract is about to become binding when the option period expires, and thus the debt as about to become established irrevocably.

On the other hand, liability for an amount of money that a slave may use to free himself and liability for a *ju'alah* prior to completion of the task are not considered binding liabilities, and therefore pawning is not valid in lieu of such liabilities. In the two mentioned examples, one party may void the contract, and thus the purpose of pawning, which is to ensure a liability, cannot be satisfied.

3. The debt must be known in amount and characteristics. Thus, if one or both contracting parties are uncertain about the liability in lieu of which an object is pawned (e.g. an unspecified debt out of two), the pawning is not valid.

### 70.3.5 Mālikī conditions

The Mālikīs ruled that all fungible binding liabilities are eligible for use in pawning contracts except for two: (i) the price of *salam*, and (ii) either part of a currency exchange contract. The fungibility condition implies that they invalidate pawning an object in lieu of a trust such as a deposit or the capital



of a silent partnership. The condition of establishment as liability further implies that non-fungibles and their usufruct may not be the basis of a pawning contract.<sup>27</sup> Finally, the condition that the debt must be binding or about to become binding implies that pawning in lieu of liability for the amount of money by means of which a slave can buy his freedom is not valid.

## 70.4 Pawned Object Conditions

The pawned object is a property of the debtor that is held by the creditor in lieu of the underlying debt. Thus, if the pawned object is of the same genus as the underlying liability, the creditor may extract his credit from the pawned object if the debt is not repaid. On the other hand, if the underlying liability was monetary, and the pawned object was a non-fungible of a different genus, then the pawned object may be sold, and the debt may be repaid from the collected price. Finally, if the underlying debt was not monetary, e.g. if it is denominated in wheat, while the pawned object is of a different genus, then repayment may be effected through exchange.

For those reasons, jurists have agreed that a pawned object must satisfy the conditions of objects of sale, so that it may be sold to repay the debt out of its price.<sup>28</sup> The Ḥanafis ruled that if the debtor is absent, and it is not known whether or not he is alive, then the pawned object may be sold by permission of the judge. However, if the debtor is present, he is forced to sell the pawned item, otherwise the judge or his deputy may sell it and repay the creditor.<sup>29</sup>

The Ḥanafis listed eight conditions for the object of a pawning contract: (i) being valued property, (ii) being known, (iii) being deliverable, (iv) being in receipt, (v) being in possession, (vi) not being attached to a non-pawned item, (vii) being separate from other properties, and (viii) being distinguished from other properties. Otherwise, the pawned object maybe movable or immovable, fungible or non-fungible. In the remainder of this chapter, we shall discuss each of the conditions separately.

### 70.4.1 Eligibility for sale

The object of a pawning contract must satisfy the conditions of the object of sale. Thus, it must exist at the inception of the contract, and must be deliverable. Thus, it is not permissible to pawn items that do not exist, or whose items are uncertain, at the inception of the contract. For instance, it is not permissible

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<sup>27</sup>For example, if someone buys a specific animal from another, and receives a pawned object from the seller to ensure against possible defects, whereby the seller should deliver the same non-fungible without a defect to take back his pawned object (which is impossible). Another example is the case where a person rents a specific car from another, and receives a pawned object as insurance that the lessor will deliver the exact same car if it is claimed by a third party or found to be defective, which is also impossible. Since both examples are logically impossible, they are legally impermissible. On the other hand, pawning so that the buyer or lessee may extract the value of the non-fungible or its usufruct is permissible.

<sup>28</sup>Ibn Qudāmah (, vol.4, p.337).

<sup>29</sup>Ibn cAbidīn ((Ḥanafī), vol.5, p.357).



to pawn the fruits of one's trees this year, the offspring of one's sheep this year, birds in the sky, runaway animals, etc. In this regard, non-existence or uncertainty of existence of the pawned object makes it impossible to sell it, and thus makes it impossible to use for debt repayment.

As a consequence of this condition, most jurists agree with the Ḥanafī jurists that pawning of fruits or green plants prior to ripening is not valid. This is the most widely accepted opinion among the Shāfi'īs and Mālikīs (as reported by Al-Dusūqī), and one of two reported opinions in the Ḥanbalī school. Thus, they ruled that pawning fruits prior to their ripening, and pawning green plants without the condition of cutting them, are invalid since such goods are not eligible for sale.<sup>30</sup>

On the other hand, the Mālikī jurists 'Ibn Al-Qāsim and 'Ibn Al-Mājiṣhūn, and the majority of Ḥanbalīs, enumerated some exceptions to the general juristic rule that: "Properties ineligible for sales are ineligible for pawning". The exceptions they stipulated are: pawning fruits prior to ripening without a condition of cutting, pawning green plants without a condition of pulling, and pawning of runaway and lost animals. In this regard, they argued that the prohibition of selling such items was based on the possibility of defects in such properties, or unnecessary risk and uncertainty. However, such considerations do not affect pawning, since the underlying debt is established as a liability on the pawning party, and thus if the pawned object were defective or lost, the right of the creditor remains intact as a liability on the debtor. On the other hand, if the pawned object turns out to be intact, e.g. the fruits ripen or the lost animal returns, then the creditor would benefit from being able to sell the pawned object to collect his credit once it becomes due. On this basis, some Mālikīs and Ḥanbalīs permitted pawning certain properties that are not eligible for sale at the inception of the pawning contract, provided that those properties are not sold until they become eligible (e.g. when the fruits ripen, or the lost animal returns) and the debt is matured.

#### 70.4.2 Being a property

It is not permissible to pawn non-properties such as dead animals or animals hunted during a state of ritual purity in preparation for pilgrimage (*'iḥrām*), since their meats are of no use to Muslims.

The majority of non-Mālikī jurists also stipulated that usufruct may not be pawned, e.g. pawning the rights to use a house for a stipulated period.<sup>31</sup> This ruling follows from the Ḥanafī classification of usufruct as non-properties, and the non-Ḥanafī view that usufruct is undeliverable at contract time, since it does

<sup>30</sup> Al-Dardīr ((Mālikī)A, vol.3, p.233 onwards), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.269), 'Ibn Juzayy ((Mālikī), p.323), 'Ibn Qudāmah (, vol.4, p.343), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.124), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.315), 'Abū-'Iṣḥāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.309).

<sup>31</sup> The Ḥanbalīs said that pawning such usufruct is not valid, since the objective of the creditor in such a contract is to extract the debt from the pawned object, but the usufruct of an object would have vanished by the time the debt is matured, c.f. 'Ibn Qudāmah (, vol.4, p.350), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.307).



not exist at that time, and since it vanishes immediately following its transient existence.<sup>32</sup> Thus, since usufruct is transient and does not remain intact for any extended period of time, but gets replaced by another, it cannot be possessed or delivered, and it cannot remain in existence until the time of debt maturity and required repayment. However, the *Shāfiʿīs* only forbade pawning usufruct at the contract inception, but permit usufruct to be pawned if it is not used to establish the pawning contract, e.g. if a person dies in debt while having the rights to the future usufruct of some properties [the rental value of which may be used to pay creditors].

### 70.4.3 Being valued

The pawned property must be valued so that it may be used to repay the pawning party's debt. Thus, a Muslim is not allowed to pawn wine or pork, nor to accept them as pawned objects from a Muslim or a non-Muslim. This ruling follows from the fact that a Muslim may neither repay his debts, nor collect debt repayments, from such forbidden products. Thus, if a Muslim debtor were indeed to pawn such forbidden objects with a non-Muslim creditor, that creditor would not guarantee the pawned objects, in analogy to the ruling that a usurper does not guarantee such value-less forbidden objects for their owner. On the other hand, if a non-Muslim debtor pawned some wine with a Muslim creditor, the latter must guarantee the wine for the former, again in analogy to the ruling of a usurper. In this regard, while the wine is non-property for the Muslim, it is a valued property for the non-Muslim, and thus the two resulting debts may be used to cancel out one another. In the case of a non-Muslim debtor and a non-Muslim creditor, Islamic law would recognize the pawning of pork or wine between them as valid, since they both would recognize such objects as valued properties.

### 70.4.4 Being known

As with the object of a sales contract, the object of a pawning contract must be known. In this regard, all items with sufficiently minor uncertainty to permit their sale would also be eligible for pawning, and vice versa. In this regard, we recall that the minimal degree of knowledge regarding an object of sale is that level that would make it customarily unlikely for a dispute to ensue from the contract.

Thus, if a debtor pawns “a house with all its contents” to a creditor (without specifying the contents), the *Ḥanafīs* render the pawning valid, since they would permit such a specification (a house with all its contents) in a sales contract. However, the *Shāfiʿīs* and *Ḥanbalīs* deem such a specification to contain signif-

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<sup>32</sup>The *Shāfiʿīs* expressed this by saying: It is certainly invalid to pawn usufruct, since usufruct vanishes and thus does not provide the required insurance, c.f. *Al-Khaṭīb Al-Shirbīnī* ((*Shāfiʿī*), vol.2, p.122), *Al-Bājūrī* (5th printing (*Shāfiʿī*), vol.2, p.124).



icant uncertainty, rendering a sale or pawning to be invalid.<sup>33</sup> Similarly, if the debtor says “I pawn on of those two houses to you” (without specifying which one), the Ḥanafīs render the pawning valid on the basis of their ruling that a sale with similar incomplete specification is valid, with a selection option given to the buyer.<sup>34</sup> On the other hand, the lack of specification would render a sale, and thus the proposed pawning of an unspecified house, invalid for the Shāfiʿīs and Ḥanbalīs.<sup>35</sup>

In this regard, if a debtor gives two dresses to a creditor, saying: “Take whichever one you wish in pawning in lieu of my debt”, neither dress is considered to be pawned until the creditor selects which one in his possession is the pawned object. Thus, prior to selection, the pawned object was unknown, and hence the pawning was invalid; but after selection the pawned object becomes known, and the pawning becomes valid. If both dresses were to perish in the possession of the creditor prior to specification of which one was pawned, and if the underlying debt equaled the value of one of the dresses, then the debt would be cancelled against half the value of each.

#### 70.4.5 Being owned

The condition that the debtor must be an owner of the property he pawns with the creditor is not a condition of validity for the pawning. Rather, the Ḥanafīs and Mālikīs consider this a condition of executability of the pawning. Thus, we may determine the legal status of pawning the property of another.

Thus, the Ḥanafīs and Mālikīs ruled that pawning the property of another without his permission is permissible if the pawning party has a legal guardianship, such as being the owner’s father or plenipotentiary who pawns a child’s property in lieu of a debt of the child’s or of his own. They also ruled that it is permissible to pawn the property of another person with his permission, e.g. by borrowing an item to pawn it with a creditor. In the most general case, if the owner of the pawned property did not give his permission, the pawning would be considered suspended subject to the owner’s consent, in analogy to sales.

On the other hand, the Shāfiʿīs and Ḥanbalīs ruled<sup>36</sup> that it is not permissible to pawn the property of another person without his permission. They based this ruling on their rulings of impermissibility of selling the property of another without his permission, its undeliverability (in analogy to birds in the sky or runaway animals), and the impermissibility of selling it to repay the creditor. However, if a debtor pawns a property thought to belong to another, and then it is discovered that it belonged to his deceased father and was thus his by inheritance, the Ḥanbalīs and some of the Shāfiʿīs render the pawning valid. This ruling is based on the view that the essence of the contract is what matters

<sup>33</sup>Abū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, pp.309,263), ʿIbn Qudāmah (, vol.4, p.348), ʿIbn ʿĀbidīn ((Ḥanafī), vol.5, p.356), Al-Dardīr ((Mālikī)A, vol.3, p.231).

<sup>34</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.356; vol.4, p.61), Al-Kāsānī ((Ḥanafī), vol.5, p.157).

<sup>35</sup>ibid.

<sup>36</sup>Abū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.308), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.315).



and not its form. However, the most widely accepted *Shāfiʿī* view is that this contract is invalid since it was initiated without satisfying the conditions of the contract.

Finally, all jurists agree that it is permissible to borrow an item and pawn it with a creditor.<sup>37</sup> This ruling is based on the view that once the item is borrowed, the debtor is in possession of the item for his sole benefit, and without the need to compensate the lender. This is indeed the nature of the simple loan contract, whereby the borrower has the right to benefit from the borrowed item.

#### 70.4.6 Not being attached

It is not permissible to pawn a property that is occupied by another non-pawned property of the debtors. For instance, it is not valid to pawn palm trees without pawning the dates on it, agricultural land without the plants therein, or a house without the furniture therein. On the other hand, it is permissible to pawn the occupying property without pawning the property that it occupies, provided that the two are not connected. For instance, it is permissible to pawn the load on a car without pawning the car, or pawn the furniture within a house without pawning the house.

#### 70.4.7 Being separate

The object of a pawning contract must be separate from other products and collected together. Thus, it is not permissible to pawn items that are distributed and connected to other properties, such as pawning fruits without pawning the trees they are on, or pawning plants without pawning the land in which they are planted. In such cases, the fruits or plants cannot be possessed without possessing the trees or land, and hence the pawning is not valid.

#### 70.4.8 Being clearly identified

The pawned object must be clearly identified and separated from other properties. For instance, it is not permissible to pawn a fraction of a house or car, even if the debtor and creditor were both partners in that property.

In this regard, the requirements that the pawned object be non-attached, separate, and clearly identified are all necessitated by the fact that receipt of the pawned object is a fundamental condition in pawning contracts, and not just a condition of validity. In this regard, if the pawned object was attached to another, not separate, or not separately identified, receipt of that object would be impossible. However, when the pawned object is separate and clearly identified, it may be received by the creditor, and then the pawning contract is deemed concluded and binding. However, prior to delivering the pawned object to the creditor, the debtor would still have an option to deliver it or to void the pawning, in analogy to gifts. In this regard, the pawning contract is

<sup>37</sup>*Ibn Rushd Al-Ḥafīd* ((Mālikī), vol.2, p.269), *Al-Zaylaʿī* ((Ḥanafī Jurisprudence), vol.6, p.88).



similar to the gift contract in its characterization as a voluntary contribution contract, which only becomes binding after receipt. Thus, we see that the last three conditions are in effect requirements that the object of pawning has characteristics that make its delivery and receipt possible.

## 70.5 Receipt of the Pawned Object

All jurists agree that receipt is a condition in the pawning contract, based on the verse “...then use received pawned objects [as insurance of the debt]” [2:283]. However, they differed over the classification of this condition as one of contract completion or as a bindingness condition. This difference in opinion is meaningful, since rendering receipt a bindingness condition implies that the debtor may change his mind prior to delivering the pawned object. In contrast, those who render the condition one of contract completion would rule that the contract is binding upon conclusion, and the debtor may be forced to deliver the pawned object, provided that the creditor was not lenient in demanding its receipt until the debtor died, became sick, or declared bankruptcy.<sup>38</sup>

### Non-Mālikī rulings

The non-Mālikī jurists ruled that receipt is not a validity condition in a pawning contract, but rather deemed it a condition of bindingness.<sup>39</sup> Thus, they ruled that the pawning is not binding upon the debtor prior to delivering the pawned object, and thus he may change his mind prior to such delivery. However, after the creditor receives the pawned object, the contract becomes binding, and thus may not be voided unilaterally by the debtor.

Their proof for this ruling is the verse “...then use received pawned objects [as insurance of the debt]” [2:283]. Thus, they argue that Allāh (swt) tied the pawning to receipt, which implies that the contract is not binding without receipt. Moreover, they argued that pawning is a voluntary contribution contract, which requires acceptance. In this regard, delivery and receipt establish that offer and acceptance have taken place, and that the contract is binding. This ruling, that bindingness in such voluntary contribution contracts is only established with receipt, is analogous to the ruling for gifts and loans.

### Mālikī ruling

The Mālikīs ruled that receipt is a condition of contract completion, and not a condition of validity or bindingness.<sup>40</sup>

<sup>38</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.270 onwards).

<sup>39</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.340 onwards), Al-Kāsānī ((Ḥanafī), vol.6, p.137), ʿAbd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.2, p.54 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.128), ʿAbū-ʿIshāq Al-Shirāzī ((Shāfiʿī), vol.1, p.305 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.317), Ibn Qudāmah (, vol.4, p.328).

<sup>40</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.271), Ibn Juzayy ((Mālikī), p.323 onwards), Al-Dardīr ((Mālikī)B, vol.3, p.313).



Thus, they ruled that once a pawning contract is concluded by offer and acceptance, the contract is binding, and the debtor may be forced to deliver the pawned object to the creditor as per that contract. Moreover, they ruled that if the creditor is lenient in demanding the pawned object, or if he consents to keeping it in the possession of the debtor, then the pawning contract is deemed invalid.

Their proof for this ruling is derived by analogy to other binding financial contracts, based on the verse “fulfill your contracts” [5:1]. Thus, they ruled that pawning is a financial contract that should be fulfilled. Moreover, they argued that pawning is a contract meant to ensure a debt, in analogy to guaranty, and thus it becomes binding upon the conclusion of the contract and prior to receipt.

For all schools of jurisprudence, the receipt condition implies that if a pawning contract is concluded with a stipulated condition that the pawned object must remain in the debtor’s possession, the pawning is invalidated. Consequently, if the pawned object were to perish in the debtor’s possession, the debt is not dropped. Moreover, if a pawning contract is initiated with the stipulated condition, and then the creditor demands receipt of the pawned object, he is not granted that right since the pawning was defective at its inception, and may not become valid after having been defective.<sup>41</sup>

### 70.5.1 Means of receipt

Jurists have agreed that receipt of immovable real estate is established either through physical receipt or through removal of impediments to such receipt. On the other hand, they differed in their rulings regarding receipt of movable pawned objects:

- Most Ḥanafīs ruled that removing impediments to receipt of the pawned object is tantamount to receipt.<sup>42</sup> They based this ruling on the view that convention and law consider giving access to an object to be equivalent to its receipt. This conventional understanding is extended from the case of real estate, where receipt can only come into effect through giving access to the property. Moreover, removal of impediments and giving access to any property is agreed upon by jurists as a form of delivery, even if the property is not transported or officially turned over to the new possessor to complete the delivery. Indeed, this is the most logical opinion, which agrees with the nature of financial dealings and helps to expedite delivery.
- On the other hand, ‘Abū Yūsuf ruled that giving access to a movable property is not sufficient to establish receipt, and requires transportation and official transfer of possession rights. He relied for this ruling on the verse “...then use received pawned objects [as insurance of the debt]” [2:283],

<sup>41</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.128), ‘Ibn Qudāmah (, vol.4, p.328), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.318).

<sup>42</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.138), ‘Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.269), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.128), ‘Ibn Qudāmah (, vol.4, p.232), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.305 onwards).



which he interpreted to mean actual physical receipt, which requires transportation of the property. In this regard, he argued that granting access to a property only results in a legal form of receipt, but not actual receipt, and thus is insufficient in pawning contracts. Moreover, he argued, receipt of a pawned object establishes a creditor guaranty of the pawned object, which did not exist prior to the contract. The establishment of this new guaranty requires actual receipt rather than mere legal receipt, in analogy to the guaranty of usurped objects. This case is thus contrasted with the case of a sales contract, where guaranty for the sold object is transferred from the seller to the buyer, whereby granting access to the object of sale is sufficient for that transfer. However, this distinction between the pawning and sales contracts seems inconsequential.

- The Shāfiʿīs and Ḥanbalīs agree with the opinion of ʿAbū Yūsuf.<sup>43</sup> They based their ruling on the view that the receipt meant in the verse is the usual type of receipt as expected in sales. Thus, they ruled that receipt in pawning is the same as receipt in sales, which requires only granting access for real estate and other immovable objects (including fruits on a tree or plants in the ground), but requires physical receipt for movable objects (such as jewelry, coins, clothes, etc.). In this regard, the receipt of movable goods measured by volume, weight, size, or number must be received by the appropriate measure. In determining the means of measurement and receipt of such items is determined by convention (*ʿurf*).

### Mortgaged real estate

It is clear that the objective of receiving a pawned property is to provide insurance to the creditor, who is thus empowered to extract the debt owed to him from the pawned property in his possession. Thus, delivery and receipt in pawning should not be viewed in a ritualistic manner that is divorced from the economic meaning of the contract.

Consequently, any transaction that results in a similar insurance to the creditor may take the place of the classical receipt of pawned property. For instance, contemporary civil legal provisions to establish a legal mortgage of some property by announcing it and documenting it with legal authorities accomplish the same effect of the pawning contract. Thus, those modern legal proceedings may replace the type of receipt required in classical jurisprudence. Indeed, that is the form of legal receipt that the Mālikī jurists permitted in addition to the physical receipt that all jurists had accepted.

### 70.5.2 Conditions of receipt

There are three main conditions for validity of the receipt of a pawned object:

<sup>43</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.128), ʿIbn Qudāmah (, vol.4, p.328), Al-Buhārī (3rd printing (Ḥanbalī), vol.3, p.318).



### 1. Permission of the debtor

Jurists agreed that permission of the debtor is required for the validity of receipt in a pawning contract.<sup>44</sup> This ruling follows from that fact that receipt of the pawned object renders the pawning binding, and drops the right of the debtor to demand returning his pawned object, hence requiring his permission for dropping his right. Thus, if the creditor transgresses by receiving the pawned object without the debtor's permission, he is not legally considered in receipt of a pawned object. Moreover, if the debtor gives his permission to the creditor to receive the pawned object, and then withdraws that permission prior to the actual receipt, the permission is legally voided, and the creditor may not take the pawned object. However, once the creditor receives the pawned object with the debtor's permission, the debtor has no recourse.

Jurists differed in opinion regarding the case where a creditor usurps an object without the debtor's permission, and then the debtor consents to the creditor's possession of the object, qualifying it as a pawning in lieu of his debt:

- 'Imām Mālik ruled that it is valid thus to transform the guaranty from one of a usurped object to one of a pawned object. Thus, if permission is given *ex post* prior to regaining possession of the usurped object, that object may become pawned with the creditor.
- On the other hand, 'Imām Al-Shāfi'ī ruled that such a change of guaranty is not permissible, and thus ruled that the object continues to be guaranteed by the creditor as a usurped object, even if the debtor were to indicate his consent that the creditor keep it as a pawned object. In order for the object to become pawned, it must first be given back to the debtor, who must then give permission to the creditor to take it again, but this time as a pawned object.

There are two types of permission that a debtor may give; explicit, and implicit:

- An explicit permission can take place verbally, e.g. if the debtor says: "I have given you permission to receive the pawned object", or "receive this", etc. In this regard, it does not matter whether such an explicit permission is given during the contract session or afterwards.
- An implicit permission can take place when the creditor receives the pawned object during the contract session, without any objection from the debtor. Such an implicit permission would render the receipt valid, since the offer to pawn an object implies the debtor's consent to the consequences of the contract, which can only be satisfied through receipt. Thus, the offer in the pawning contract may be viewed as an implicit permission to collect the pawned object during the contract session. However, that

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<sup>44</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.138), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.269), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.128), 'Ibn Qudāmah (, vol.4, p.332), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.305 onwards).



permission does not extend beyond the contract session, since the debtor may change his mind after the conclusion of that session.

One can reason by analogy on the basis of Zufar's ruling regarding the receipt of gifts. The ruling thus would require an explicit permission to receive the pawned object, and even then would only permit receipt during the pawning contract session, and not afterwards. This ruling follows from Zufar's view that receipt is a cornerstone of the pawning contract (and thus the contract is deemed non-existent if receipt does not take place during the contract session).

## 2. Eligibility of contracting parties

Both parties to a pawning contract must be eligible at the inception of the time of delivery and receipt of the pawned object. In other words, they must be of sane mind and legal age, and for jurists who add legal impediments on the financial dealings of bankrupt individuals, the parties must not be bankrupt. This ruling follows from the fact that the consequences of the pawning contract take effect through receipt, and thus all the conditions of the contract must apply to receipt. The preceding are the conditions for the Shāfi'is and Ḥanbalis. The Ḥanafis and Mālikis also permit a discerning child with trading privileges to engage in pawning contracts, even before reaching legal age, since they view pawning as a derivative of trading.<sup>45</sup>

Jurists differed in opinion over the case where a pawning contract is concluded by eligible parties, and then one of the parties to the contract loses his mind, or dies, prior to receipt:

- The Ḥanafis rule in this case that the pawning contract is invalidated, since one of the parties becomes ineligible prior to the contract's completion.
- The Ḥanbalis and most Shāfi'is ruled that the pawning contract is not invalidated thus, in analogy to a sales contract with an associated option. Thus, they ruled that the legal guardian of the insane or mentally incompetent party, or the heir of the deceased party, may take their place in the contract. On the other hand, if the debtor is legally restricted in his dealings due to declaring bankruptcy, then he is not allowed to deliver the pawned object. Moreover, if the debtor enters into a coma, the creditor is not allowed to collect the pawned object while he is unconscious.
- The Mālikis ruled that prior to receipt of the pawned object, if the debtor dies, becomes insane, declares bankruptcy, or becomes terminally ill, the pawning is invalidated. In contrast, they do not consider the pawning to be invalidated if death, insanity or bankruptcy were to befall the creditor. The latter ruling follows from their view that the contract was concluded

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<sup>45</sup> Al-Kāsānī ((Ḥanafī), vol.6, pp.135,141), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, pp.268,271), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.122,129), 'Ibn Qudāmah (, vol.4, p.328 onwards), Al-Dardīr ((Mālikī)B, vol.3, p.316), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.319), Al-Dardīr ((Mālikī)A, vol.3, p.241), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.307).



through offer and acceptance, and completion of its consequences is apparently beneficial to the creditor, and hence his heir or legal guardian may take his place in receiving the pawned object.

We also need to consider the various opinions for the case where the debtor becomes terminally ill prior to delivering the pawned object:

- If the debtor has other creditors and no other properties from which to pay the other debts, the Ḥanafīs do not permit delivery or receipt of the pawned object in this case, unless the other creditors agree to such receipt. This ruling is based on the principle that none of the creditors should be given priority in collecting their debts at that stage.
- As we have seen previously, the Mālikīs agreed with the Ḥanafīs on this ruling.
- In contrast, most of the Shāfiʿīs and some of the Ḥanbalīs ruled that a terminally ill debtor may give priority to some of his creditors in repayment, even if his debts exceed the totality of his wealth. They ruled thus on the basis that by delivering the pawned object, he is satisfying one of his liabilities, and thus must be allowed. However, other jurists in the two schools ruled that he is not allowed to deliver the pawned object once he becomes terminally ill.

### 3. Permanency of receipt

The Ḥanafīs, Mālikīs, and Ḥanbalīs required the receipt of pawned objects to be permanent and final, until the debt is repaid or it is used to extract repayment.<sup>46</sup> Jurists have differed over the case where a creditor receives the pawned object, and then returns it to the debtor voluntarily, as a loan, deposit, or with permission to use (e.g. to ride if the pawned object is a car):

- The Mālikīs ruled in this case that the pawning contract is invalidated.
- The Ḥanafīs ruled in this case that the pawning remains valid, but the pawned object would thus no longer be guaranteed by the creditor, who retains the right to recollect the pawned item.
- The Ḥanbalīs ruled in this case that the contract remains intact, but the bindingness of the contract is removed, as if the pawned object was never received. Then, if the pawned object is delivered to the creditor once more, they ruled that bindingness is re-instated by virtue of the initial pawning contract.

This is in contrast to the Ḥanafīs and Mālikīs who ruled that the pawning may only be reinstated in this case through a new contract. Their proof

<sup>46</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.142), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.271 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.241 onwards), 'Ibn Juzayy ((Mālikī), p.324), 'Ibn Qudāmah (, vol.4, p.331), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.228).



for this position was their interpretation of the verse “. . . then use received pawned objects [as insurance of the debt]” [2:283] to imply the necessity of a permanent receipt.

- On the other hand, the Shāfiʿīs ruled that if the pawned object may continue to exist even if used (e.g. a car), then permanency of receipt is not a condition for the validity of that receipt.<sup>47</sup> Thus, they ruled that it is permissible for the creditor to lend the received pawned object to the debtor, permissible for the debtor to take the pawned object with the creditor’s permission, and permissible for the debtor in those cases to use the pawned object for riding, residence, etc. In all such cases, they still consider the pawned object to be insurance for the debt. They based this ruling on the Ḥadīth narrated by Al-Dāraqūṭnī and Al-Ḥākim that “It is permissible to ride a pawned riding animal, or milk a pawned dairy animal”, and the Ḥadīth narrated by Al-Bukhārī that “It is permissible to ride a pawned riding animal in exchange for its expenses”. Moreover, they argued that receipt is considered only at the inception of pawning, but need not be permanent as in the case of gifts.

On the other hand, if the pawned object would be consumed if used, the debtor is not allowed to request regaining possession and using the pawned item after he had delivered it. In this case, the creditor’s possession of the pawned object must be permanent to protect his rights from being lost.

### Pawning received items

Jurists have differed over the case where an object that is already in the creditor’s possession (through a simple loan, deposit, lease, or usurpation) is pawned to him in lieu of a debt. In this case, jurists differ in their ruling regarding whether or not the existing receipt is sufficient. If it is, then the conclusion of a pawning contract through offer and acceptance would render the contract binding, since receipt came into effect prior to the contract. However, other jurists argued that a new receipt is necessary to make the pawning contract binding:

- The Ḥanafīs, Mālikīs, and Ḥanbalīs ruled that the prior receipt is sufficient, and there is no need to have a new receipt for the pawning contract.<sup>48</sup>

In this regard, the Ḥanafīs have established a general juristic principle that applies to gifts, pawning, and other similar voluntary contribution contracts. That principle is that if the pawned object was already in receipt at the inception of the contract, then it substitutes for the receipt of the pawning contract if the two receipts are of the same genus (i.e. if they are of equal strength in terms of trust or guaranty). However, if the

<sup>47</sup>Abū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.311), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, pp.130-2).

<sup>48</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.142; vol.5, p.126 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.236), ʿIbn Qudāmah (, vol.4, p.334), Al-Dardīr ((Mālikī)B, vol.3, p.309), ʿIbn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.269).



two receipts are of different strengths, then the stronger of the two may replace the weaker.

For instance, we know that the possession of a deposit is a possession of trust, while the possession of a usurped object is a possession of guaranty, which is stronger than the former. In this regard, the possession of a pawned object is a possession of trust, which is the weakest possible form of possession.<sup>49</sup>

Thus, if the prior possession of the pawned object was a possession of trust (e.g. through deposit, simple loan, or lease), the Ḥanafīs thus rule that the prior possession is of the same genus as the possession of pawning, and there is no need for a new receipt. On the other hand, if the prior possession was one of guaranty (e.g. if the object was usurped), and then it was pawned to the creditor-usurper, the prior possession of guaranty would be stronger than the weaker pawning possession of trust, and thus there is no need for a new receipt to bring into effect the weaker possession.

The Mālikīs also ruled that any prior possession of the pawned object is sufficient, since they consider the objective of receipt to be possession, which is thus in effect. In this regard, they mentioned explicitly the permissibility of pawning a leased item to a lessee-creditor prior to the expiration of the lease period, as well as the permissibility of pawning a garden to the worker who is in possession of the garden through a crop-sharing contract.

The Ḥanbalīs also ruled that a pawning contract is valid and binding through offer and acceptance if the object of pawning was already in the creditor's possession through a simple loan, deposit, usurpation, etc. Thus, they ruled that the creditor's possession of the pawned object after the pawning contract is the real condition of that contract, and not the actual act of receipt.

In this regard, the non-Shāfi'ī jurists ruled that if the creditor held the pawned object previously in a possession of guaranty, that possession becomes a possession of trust by virtue of the pawning. This ruling is based on the view that the reason for guaranty was thus eliminated through the pawning contract, in analogy to the dropping of guaranty upon returning usurped items (the Ḥanbalīs and some of the Shāfi'īs also ruled that the possession of the object of a simple loan is a possession of guaranty). In this regard, if the creditor had usurped the debtor's property, and then the debtor pawned it to him in lieu of his debt, the creditor is no longer

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<sup>49</sup>In this regard, the fact that the debt or part thereof is dropped if the pawned object were to perish does not imply a stronger form of possession. In fact that dropping of the debt is based on the view that the property value of the pawned object is kept with the creditor to guarantee his right that he may extract it from its value. Thus, it is established that the debt may be repaid through the pawned object, and an equivalent amount of the debt may be dropped in exchange for the property value of the pawned object if it perishes. Indeed, whatever extra value may be inherent in the perished pawned object would thus perish in a possession of trust, since that excess amount was not held by the creditor for debt repayment.



viewed as a usurper, and hence his possession is no longer a possession of guaranty.

- The Shāfi'is and the Ḥanbalī Qāḍī 'Abū Ya'cīlā ruled that the prior receipt is sufficient, but is not considered a received pawned object unless a sufficiently long period passes during which receipt could have taken place.<sup>50</sup> Thus, if the pawned object is portable, then a sufficient period to transport it must pass before its receipt as a pawned object is established. Similarly, if the pawned object is measured by volume, then a sufficient period to measure it must pass, and if it is immovable, then a sufficient period to give access to it must pass. In addition, if the pawned object was not physically in the creditor's possession, then a sufficient period must pass during which the creditor or his agent could get to it, and then an additional period must pass during which receipt could have taken place. They based this ruling on the view that the pawning contract requires the act of receipt, which is a process that requires a sufficient period of time.

In this regard, the Shāfi'is ruled that if the prior possession of the pawned object was a possession of guaranty, it remains thus after the pawning. Thus, contrary to the other jurists, they ruled that if a creditor usurped the property of his debtor, and then the debtor pawned that property to him in lieu of the debt, the pawning does not absolve the creditor from being a usurper (and similarly in simple loans), and his possession remains one of guaranty.<sup>51</sup> In this regard, the Shāfi'is see no contradiction between the two issues of possessing the pawned object as a trust to guarantee the debt, while holding it in a possession of guarantee by virtue of being a usurper (or borrower).

As proof, they gave the example of a creditor who transgresses against the pawned object in his possession, in which case he would thus guarantee it (thus establishing a possession of guaranty), while the pawning contract remains intact (thus retaining the possession of trust) since the creditor continues to have priority in extracting repayment of his debts from the pawned object. Thus, if the weaker possession established through the pawning contract is not removed or invalidated when possession of guaranty is established, it is only logical that the stronger possession of

<sup>50</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.306), 'Ibn Qudāmah (, vol.4, p.334), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.128).

<sup>51</sup>Thus, pawning does not absolve the usurper from being a usurper. This follows from the fact that even if the owner of a usurped property absolves the usurper of the existing property, the usurper would not thus be absolved. Indeed, this is an instance of the general rule that one cannot be absolved of liabilities for non-fungibles, but may only be absolved of fungible debts established as a liability. Other examples exist where absolution is not possible. For instance, if the owner of a property absolves another from guaranteeing what is established as a liability on him if it perishes, the absolution does not take place since absolution requires an established matured fungible debt from which the liable party may be absolved. In analogy to the case of pawning, if the owner of usurped property leases it to the usurper, uses it as capital in a silent partnership with the usurper, or hires the usurper as an agent to deal in it, the usurper would not be absolved of the act of usurpation.



guaranty is neither removed nor invalidated when the weaker possession of trust is established through the pawning.

This is to be contrasted with the case of depositing a usurped item with the usurper. In the latter case, the usurper is absolved of usurpation, since the trust involved in the deposit contract contradicts the notion of possession of guaranty. As proof for the different ruling in this case, notice that if the depositary transgresses against the deposit, he would not longer be entrusted with it, in contrast to the case of transgression against a pawned object.

### 70.5.3 Receivers of pawned objects

Either the creditor or his agent may receive the pawned object. However, it is not permissible for the creditor to appoint the debtor as his agent in receiving the pawned object. The latter ruling follows from the fact that the objective of a pawning contract is to ensure the creditor of repayment of the debt, and thus the pawned object may not remain with the debtor.

On the other hand, the debtor and creditor may mutually agree that the pawned object will be kept with a third party who receives it thus. This third party is thus named “the trustee” (*al-ʿadl*). This arrangement may be useful if the creditor does not wish to leave the pawned object with the creditor, and the latter does not wish to keep it with him lest he has to guarantee it against certain types of destruction.<sup>52</sup>

#### Trustee rulings

A trustee is by definition a person whom the debtor and creditor trust to hold and protect the pawned object.<sup>53</sup> He thus serves in the capacity of a proxy for both parties. He is viewed as a proxy of the debtor since he protects his property at his request and trust in his creditworthiness. Moreover, he is also viewed as a proxy for the creditor since he acts as his agent in receipt and keeping of the pawned object. Indeed, such receipt takes place with the consent of the creditor, to the point of considering his receipt to be a form of receiving debt repayment in certain respects.

Thus, the trustee satisfies two types of characteristics in terms of trust and guarantee. As a proxy for the debtor who owns the pawned object, he acts as a depositary of that object, thus holding the object itself in a possession of trust. Simultaneously, as an agent of the creditor, he guarantees the financial aspect of the pawned object.

<sup>52</sup> Al-Dardīr ((Mālikī)A, vol.3, p.321).

<sup>53</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.80).



### The trustee as an agent

As an agent of the debtor and creditor in a pawning contract, the trustee must satisfy all the conditions of agents.<sup>54</sup> Thus, all jurists agree that the trustee cannot be a young non-discerning child, or any individual who is legally restrained due to insanity. Moreover, the non-Ḥanafī jurists do not permit discerning children or individuals who are legally restrained due to mental incompetence to serve in this capacity.

Moreover, a guaranteed debtor may not act as a trustee in a pawning contract wherein his guarantor gives a pawned object to the creditor. This ruling follows lest the debtor be working on his own behalf. Similarly, the debtor's partner may not act as a trustee in his pawning contract, and the investor in a silent partnership may not act as a trustee for an object pawned by the entrepreneur in that contract, since the possessions of both parties are equivalent.

If the two parties agree that the debtor will act as a trustee, then we consider two cases. If that agreement was reached prior to receipt of the pawned object, then all jurists agree that the pawning contract would thus be invalidated by that defective condition. However, if the agreement was reached after the creditor received the pawned object, then the non-Shāfi'is render the pawning invalid, while the Shāfi'is permit the agreement, since they do not stipulate permanency of receipt as a condition of pawning.<sup>55</sup>

Both parties to a pawning contract must agree on the trustee, whether he is appointed prior to receipt of the pawned object by the creditor or afterwards. Appointing a trustee after receipt may be necessary if the debtor does not trust the creditor to protect his property.

Once a trustee receives the pawned object, his receipt is valid and binding in the view of most jurists. They based this ruling on the view that receipt of a pawned object is part of the pawning contract, and thus is eligible for agency in analogy to other receipts in other contracts. Thus, the trustee will be considered an agent of the creditor in receipt, guaranteeing the financial property aspect of the pawned object. As we have seen, he is also viewed as an agent of the debtor, holding his property in a possession of trust.

On the other hand, a few jurists including 'Ibn 'Abī Laylā, Zufar, and Qatādah ruled that the trustee receipt is not valid. They based their ruling on the view that receipt of the pawned object is necessary for contract completion, and thus must be performed by one of the parties to the contract (in this case the creditor), in analogy to other conditions like offer and acceptance.<sup>56</sup>

<sup>54</sup> Al-Kāsānī ((Ḥanafī), vol.6, 150), 'Ibn Qudāmāh (, vol.4, p.351), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.133).

<sup>55</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.133 onwards).

<sup>56</sup> 'Ibn Qudāmāh (, vol.4, p.351), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.133), 'Abū 'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.310), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.220), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.80), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.357), Al-Dardīr ((Mālikī)B, vol.3, p.321).



### Multiple trustees

The Ḥanbalīs and most Shāfi'īs<sup>57</sup> ruled that it is permissible for the two parties of a pawning to appoint two joint trustees. In this case, they ruled that the two trustees must thus hold the pawned object jointly, and neither one may hold it alone. Thus, if one of the trustees gives the pawned object to the other, he must thus guarantee half of it, since he is considered to be a transgressor for that half. This ruling is based on the fact that the two contracting parties only consented to the joint trusteeship of the two appointed trustees, and thus neither may keep it alone. For instance, the two trustees may in practice keep the pawned object in a single storage place with each of them keeping a key. On the other hand, 'Abū Ḥanīfa ruled that if the pawned object is divisible, then each of the two trustees may keep half of it, to avoid excessive costs associated with holding it all jointly. Finally, 'Abū Yūsuf and Muḥammad ruled that if one of the two trustees agrees to let the other hold the entire pawned object, then they may do so.

### Relieving a trustee

A trustee may be relieved of his duties in one seven ways:<sup>58</sup>

1. The trustee may resign and return the pawned object to the contracting parties, in which case his agencies is terminated. This ruling follows from the fact that the trustee provides his trust and keeping services as a voluntary contribution, and thus he is not bound to continue providing such services. In this regard, if the contracting parties refuse to accept the trustee's resignation, he may appeal to a judge, who would thus force them to accept his resignation, and perhaps forward the pawned object to a different trustee.
2. The two parties may decide to fire a trustee or replace him by another, in which case his agency is terminated. Similarly, if the pawned object is held by the creditor, the trustee is implicitly fired, since he must act as an agent for both parties. If the two parties cannot agree on firing the trustee or keeping him, they may appeal to a judge to decide whether to keep him or replace him by another.
3. If the pawned object is sold, and the creditor's due is paid out of its price, the trustee is relieved of his duties.
4. Most Ḥanafīs ruled that if the debtor dies, and the trustee was appointed after the pawning contract was concluded, the trustee is thus relieved of his duties, since he would be an agent in that case, and agencies are terminated by the death of the principal. In contrast, if the trustee was appointed as part of the pawning contract, then he is not relieved of his

<sup>57</sup>'Ibn Qudāmah (, vol.4, p.134), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), p.310).

<sup>58</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.151), 'Ibn Qudāmah (, vol.4, p.353 onwards), Al-Khaṭīb Al-Shīrīnī ((Shāfi'ī), vol.2, p.134 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.307).



duties upon the death of either contracting party, since his appointment is thus attached to the contract, and the pawning contract is not invalidated by death of either party. Hence, the trustee would not be relieved of his duties in this case.

On the other hand, the Ḥanafīs ruled that if the creditor were to die, then his heirs have the right to keep the pawned object, since it is an insurance of his property that is transferred to them by inheritance.

The Ḥanbalīs and Shāfiʿīs ruled that a trustee is relieved of his duties if the debtor dies, but not if the creditor dies.<sup>59</sup> They based this ruling on their view that the trustee is an agent of the debtor, but not an agent of the creditor.

5. If the trustee dies, his heirs are not entitled to hold the pawned object, unless the contracting parties of the pawning contract agree to that.
6. If the trustee becomes permanently insane, he is thus relieved of his duties. However, he is not relieved of his duties thus if he is only beset by temporary insanity, from which he is expected to recover.
7. The Shāfiʿīs and Ḥanbalīs ruled<sup>60</sup> that the debtor may fire the trustee, whether his appointment was agreed upon as part of the contract or afterwards. However, they did not permit the creditor to fire the trustee in either case. This ruling again follows from their view that the trustee is an agent of the debtor but not of the creditor, as we have seen in the discussion of death of a contracting party.

The Ḥanafīs, on the other hand, ruled<sup>61</sup> that the debtor may fire the trustee if his appointment took place after the contract, but may not fire him if he was appointed as part of the pawning contract.

Finally, ʾImām Mālik ruled that the debtor may never fire the trustee. He based this ruling on the view that upon appointment as a trustee, his agency becomes one of the rights of the pawning contract. Such a right of the contract may not be dropped unilaterally by the debtor, in analogy to its other rights.

In summary:

- The Shāfiʿīs and Ḥanbalīs ruled that death of the debtor, or his firing of the trustee, would result in relieving the trustee of his duties. Those rulings are based on the view that agency is a permitted but non-binding contract, and thus the debtor may not be forced to keep the trustee's agency against his will.
- On the other hand, the Ḥanafīs ruled in those two circumstances that the trustee would be relieved of his duties only if he was appointed after the

<sup>59</sup>Ibn Qudāmah (, vol.4, p.354).

<sup>60</sup>Ibn Qudāmah (, vol.4, p.353).

<sup>61</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.151)



contract. However, if he was appointed at the time of the contract, he may not be relieved of his duties upon the death of the debtor, or unilateral firing by the latter.

- The Mālikīs ruled that the trustee may not be relieved of his duties in either of those two cases of death of the debtor or unilateral firing by the latter. Moreover, they also agreed that the trustee may not be relieved of his duties in the cases of death of the creditor or unilateral firing by the latter, since he is viewed as an agent of the debtor who owns the pawned object. As proof for the latter rulings, they noted that the debtor may appoint the trustee unilaterally as his agent, and thus the trustee may not be fired unilaterally by another party.

### Trustee rights and obligations

In what follows, we list five rights and responsibilities for the trustee holding a pawned object.<sup>62</sup>

1. The trustee must protect the pawned object in the same manner that he protects his own property. Thus, he must protect it himself, or keep it with a person with whom he keeps his own property. In other words, his responsibility for protecting the pawned object is the same as those of a depositary.
2. The trustee must keep the pawned object in his possession, and may not give it to the debtor or creditor without the other's permission. This follows from the fact that he was jointly trusted by both parties to hold it, implying that neither party wanted the other to hold it.

Consequently, neither the debtor nor the creditor has the right to take the pawned object from the trustee, since they both have a right attached to it (the debtor has the right that his property be protected, and the creditor has the right of extracting debt repayment from its price if necessary). In this regard, neither party is entitled to void the other's right. Thus, if the trustee gives the pawned object to one of the two parties without the other's consent, the other party has the right to regain possession of the object and return it to the trustee's possession. In this case, if the pawned object were to perish in the possession of either party, before it is returned to the trustee, then the trustee must guarantee its value since he is considered a transgressor by giving the object to one of the parties without the other's consent. Thus, the Ḥanafīs and Mālikīs ruled that the trustee would guarantee the lesser of the debt and the value of the pawned object.

<sup>62</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.148 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.80 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.221 onwards), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.358 onwards), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.57), Al-Dardīr ((Mālikī)B, vol.3, p.321), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.134), 'Ibn Qudāmah (, vol.4, p.353 onwards).



Similarly, if the trustee forwards the pawned object to another party prior to the debt being dropped, without the consent of the debtor and creditor, he must guarantee the lesser of its value and the value of the debt. If the trustee were then to offer the value of the pawned object as compensation to the two parties, they may keep the money with him itself in a pawning in lieu of his debt. However, the trustee cannot himself establish the value that he owes as pawned money in his possession, since he is the one who should pay it, and he cannot take both sides of the new pawning contract.

Then, if the debtor repays his debt, and demands collection of the pawned object's value from the trustee, we need to consider two cases:

- If the trustee's transgression by virtue of which he guaranteed the pawned object involved forwarding that object to the debtor, then the latter is not entitled to collect the value of the object. In this case, the debtor would have received his right, and thus the value belongs in reality to the trustees.
  - If the trustee's transgression involved forwarding the pawned object to the creditor, then the debtor has the right to collect the object's value from the trustee, as compensation for his property. In this case, the trustee is not entitled to seek compensation for what he guaranteed from the creditor, since he is considered to have given him the pawned object as a simple loan or deposit. In other words, by paying the object's value to the debtor, the trustee thus gained ownership of the pawned object, which he thus is considered to have given to the creditor to establish a possession of trust through simple lending or depositing. However, if the trustee forwarded the pawned object to the creditor as a form of secondary pawning, in analogy to received items in unconcluded pawning or sales, then the creditor's possession would be one of guaranty, and the trustee is entitled to compensation.
3. The trustee is not entitled to benefit from the pawned object, nor is he entitled to deal in it through leasing, simple lending, or pawning. This ruling follows from the fact that he is obliged to hold the object, but not entitled to use it.

In this respect, we need to consider the cases under which the trustee is allowed to sell the pawned object. In general, the trustee is not allowed to sell the pawned object, unless he was explicitly empowered to do so during the pawning contract or afterwards. However, if the trustee were to die, his heir does not inherit his right to sell the pawned object, since agencies are not inheritable.

Similarly, the trustee's plenipotentiary is may not take his place in selling the pawned object, since the debtor never indicated acceptance of the plenipotentiary's judgment in sales. This is in contrast to 'Abū Yūsuf's opinion, which stated that agencies are binding, and hence he ruled that



the plenipotentiary may sell the pawned object in analogy to the permitted dealings of the plenipotentiary of a deceased entrepreneur in a silent partnership. However, 'Abū Yūsuf's argument was rejected by other jurists on the basis that an entrepreneur in a silent partnership is entitled to appoint agents during his life, without the capitalist's consent, in contrast to a trustee who is not allowed to appoint an agent without the debtor's consent. It is in this regard that the plenipotentiary of a deceased entrepreneur may take his place in dealings (in analogy to a father dealing in his young child's property), but that ruling does not apply to the case of a deceased trustee.

If the trustee sells the pawned object, it is no longer pawned. This ruling follows from the fact that the object thus becomes owned by the new buyer, and its price takes the place of the pawned object.

In this regard, the trustee is entitled to sell any increases derived from the pawned object, since they are considered to be pawned as derivatives of the object itself. 'Abū Ḥanīfa also ruled that the trustee is allowed to sell at a price equal to the value of the pawned object, or slightly below that value as long as the price is within normal variations in price. He also ruled that the trustee is allowed to sell on a cash-and-carry or credit basis. Moreover, the trustee is allowed to sell the pawned object before the debt is matured, in which case the collected price is considered to be the pawned object in his possession until the time of maturity of the underlying debt, since the price of a pawned object is considered to be itself pawned.

The Shāfi'īs and Ḥanbalīs ruled that the trustee is only allowed to sell the pawned object on a cash-and-carry basis, and with a price denominated in domestic currency, in analogy to their rulings for selling agents. They also ruled that if the trustee sold the pawned object and received its price, then he must guarantee the price for the debtor (since the object belonged to him and he serves as his trustee) until he delivers it as debt repayment to the creditor.

4. If the pawned object perishes in the trustee's possession, without the latter being a transgressor, then it has the same legal status as it would if it perished in the creditor's possession. This ruling follows from the fact that the trustee's possession is equivalent to the creditor's possession with regards to the financial property aspect of the pawned object. The Ḥanafī ruling for this case is that the creditor guarantees the pawned object for the lesser of its value and the amount of the debt.

On the other hand, if the trustee guarantees the value of the pawned object due to his transgression, or if a third transgressing party guarantees the object after it is wrongfully given to him by the trustee, the Ḥanafīs rule that the trustee is not entitled to keep the value of the object a pawning in his possession. This ruling follows since in both cases, the value of the pawned object would be a liability on him, and he is not allowed to take



both sides of a new pawning. In this case, the value of the pawned object must be delivered either to the debtor or to the creditor, and the two of them may jointly decide to keep it as a pawning with the same or another trustee. The Shāfiʿī and Ḥanbalī rulings differed slightly from their Ḥanafī counterpart by allowing the trustee to keep the value as a pawning in the case where the transgressor was a different party.

If the rightful owner of the pawned object is different from the debtor, and he demands to regain possession of his property, he should be granted his demand, and the pawning is thus invalidated. If the pawned object had perished prior to being demanded by its rightful owner, then the latter would have the option whether the trustee or the debtor should guarantee the value of his perished property. If the rightful owner decides to demand compensation from the trustee, then the trustee may in turn demand compensation from the debtor who deceived him.

5. The Ḥanafīs ruled that a trustee who is empowered by the pawning contract to sell the pawned object may not resign without the creditor's consent. This ruling is intended to protect the right of the creditor, for whom the trustee's selling agency is thus stipulated as a condition of the pawning contract. Thus, the trustee may be forced to sell the pawned object once the underlying debt is matured. Indeed, if he refuses to sell the object after the underlying debt is matured, the judge may incarcerate him to force him to sell, and if he continues to resist, then the judge may sell the object himself. Those rulings follow from the fact that selling the pawned object becomes a right of the creditor once the debt is matured.

On the other hand, the majority of Ḥanafīs ruled that if the trustee was appointed as a selling agent after the pawning contract, then he may resign. They based this ruling on the view that his selling agency would thus be a separate agency contract, which is subject to the standard conditions of agency contracts. However, 'Abū Yūsuf ruled in this case that the trustee is not allowed to resign.

In contrast, the Shāfiʿīs and Ḥanbalīs ruled that a trustee may resign in all cases. Their ruling was based on the view that the agency contract is separate from the trusteeship contract and the pawning contract, and thus the trustee as selling agent may not be forced to continue his agency against his will.

## 70.6 Specific consequences of pawning conditions

In addition to the consequences of receipt and other conditions of pawning that we discussed in previous sections, we list some of the more specific consequences that need a detailed analysis in this final section. In what follows, we shall consider eleven of the most important consequences of the pawning conditions:



### 70.6.1 Pawning an unidentified property share

Jurists differed in opinion over the permissibility of pawning an unidentified part of a property (e.g. half of a house), whereby the Ḥanafis forbade it and the non-Ḥanafis permitted it. The divergence in opinion revolves around the issue of whether or not an unidentified portion of a property can be possessed in reality.<sup>63</sup>

#### The Ḥanafī ruling

In this regard, the Ḥanafis ruled that it is not permissible to pawn an unidentified portion of a property, whether or not the property is divisible, and whether or not the parties to the pawning contract were in fact partners in the property.<sup>64</sup> The correct opinion in this case is to render the pawning defective, but binding upon receipt. This ruling follows from the fact that pawning is a condition of the pawning contract's completion and bindingness, but not a condition of its permissibility and conclusion.

The Ḥanafis based their ruling on the view that pawning requires permanency of the creditor's receipt of the pawned object. However, they reasoned, permanent possession of an unidentified portion of a property is impossible, since the possession thereof must be shared with others' possession of the rest of the property. In other words, the situation is analogous in their opinion to the case where the creditor possesses the pawned object on alternate days. This shared possession led them to invalidate the pawning regardless of whether or not the pawned object is divisible, and regardless of whether or not the two parties to the pawning contract jointly owned the object of pawning.

Moreover, possession of an unidentified portion of a property without possession the rest of that property is physically impossible, and possession of the portion that is not pawned is inadmissible. In this regard, lack of identification of the pawned portion makes it impossible to locate that portion, whether or not the object is divisible. In contrast, giving an unidentified portion of a property is valid, even if the property is invalid. In the latter case, the gift contract's outcome is the establishment of ownership of the portion given as a gift, which ownership does not contradict the lack of identification of the owned portion.

The majority of Ḥanafis ruled that the pawning of an unidentified portion of a property is defective, whether the lack of identification of the pawned portion ensued at the contract's inception or afterwards. In descent, 'Abū Yūsuf argued if the lack of identification ensues after the inception of a pawning contract, it does not render it defective. He based this ruling on the view that the Law may forgive defectiveness after the inception of the contract that it would not forgive at the contract's inception. As proof, he reasoned by analogy to the case of a gift contract, wherein the object of gift may become unidentified as a portion

<sup>63</sup>'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.269).

<sup>64</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.138), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.203 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.68 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.348), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.56).



of some property after the inception of the contract, but would not render the gift defective. The majority of jurists rejected 'Abū Yūsuf's analogy, by arguing that the instigating factor for the prohibition of pawning an unidentified portion of a property is the physical impossibility of establishing receipt and possession, which affects the contract whether the lack of identification ensues at the contract's inception or afterwards. This, again, is in contrast to the case of the gift contract, since the ownership consequences of the gift contract do not contradict the lack of identification, while the receipt and possession consequences of pawning contradict it.

The non-Ḥanafīs ruled that it is as permissible to pawn an unidentified portion of a property as it is to pawn the entire property, and as it is permissible to give it as a gift or charity, or making it a mortmain.<sup>65</sup> They permitted such pawning whether or not the object is divisible, and whether or not the parties of the contract shared in its ownership. They based this ruling on the view that whatever is eligible for sale is thus eligible for pawning. In this regard, they reasoned that the purpose of pawning is to allow the creditor to collect his credit by selling the pawned object if he cannot collect otherwise. In this regard, since the unidentified portion of a property can be sold, that objective can be fulfilled. Thus, they established the universal juristic rule that whatever can be sold can be pawned (including unidentified portions of properties).

In this regard, non-Ḥanafī jurists differed in opinion regarding the nature of possession of an unidentified portion of a property:

- The Mālikīs ruled that the creditor may thus take possession of the entire portion of the property owned by the pawning debtor, including parts that may not be pawned. They based this ruling on the need to make sure that the pawning debtor does not retain any form of possession over the pawned portion, lest the pawning would thus be rendered invalid. On the other hand, if the portions that were not pawned was not owned by the debtor, then they permit possession of the pawned portion only.

The Mālikīs also ruled that a pawning debtor need not seek the permission of his co-owner of the object part of which he pawns. This is the ruling of 'Ibn Al-Qāsim, and it was accepted by most Mālikīs based on the view that pawning the debtor's unidentified portion does not harm his co-owner of the object. However, all Mālikīs agreed that seeking the co-owner's permission is preferable as a form of commendable courtesy, and 'Ashhab went as far as to make it an obligation to seek his permission.

- the Shāfi'īs and Ḥanbalīs ruled that possession of an unidentified portion of immovable objects (e.g. real estate) is established through granting access to the creditor, whether or not the co-owner's permission is given. For movable objects, they ruled that possession requires physical delivery,

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<sup>65</sup> Al-Dardīr ((Mālikī)A, vol.3, p.235), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.269), 'Ibn Juzayy ((Mālikī), p.323), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.308), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.122 onwards), 'Ibn Qudāmāh (, vol.4, p.337), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.312).



and requires the co-owner's permission, since transporting the property requires such permission. In this case, it is permissible for the co-owner to refuse to have the object delivered to the creditor, and if the latter agrees to keep the property in the co-owner's possession, who thus serves as his agent in possession. However, if the co-owner and the creditor cannot reach an amicable solution, then the judge may appoint a trustee who keeps the property as a trust, or as a paid agent. Otherwise, alternating possession between the creditor with whom an object was pawned and the object's co-owner can continue in the same manner as it would between the two co-owners in the absence of pawning.

### 70.6.2 Pawning connected or occupied properties

The difference in opinions regarding this problem is very similar to the one discussed in the previous section:

- Thus, the Ḥanafīs ruled that it is not permissible to pawn an item that is attached to another (e.g. pawning fruits without pawning the trees to which they are connected, pawning plants without the land to which they are attached, etc.). They based this ruling on the fact that connection of the pawned object to another un-pawned object makes it impossible to possess the former without possessing the latter, in analogy to the case of pawning an unidentified portion of a property. Similarly, they ruled that it is not permissible to pawn occupied properties that contain un-pawned objects (e.g. pawning a house without pawning the furniture therein), since it is impossible thus to possess the occupied property without possessing what is contained therein.
- The non-Ḥanafī jurists, who permitted pawning unidentified portions of properties, also permitted pawning properties that are connected to or occupied by other properties, due to the possibility to deliver the pawned properties together with whatever is attached to them or occupies them. In this regard, if a house is pawned, the furniture therein is not considered a part of the pawning unless that is explicitly stated in the contract, since the furniture is not considered to be part of the house.

In the case of pawning land or structures, the Ḥanbalīs consider the properties that would be included in a sales contract to be included in the pawning contract. Thus, there are two cases to consider in the case of pawning land that contains trees, regarding whether or not the trees are part of the pawning.

However, the Ḥanbalī ruling is unequivocal if the trees are carrying observable fruits that those fruits are not considered to be part of the pawning, as they would not be part of a sale of the land. However, if the fruits were not observable, then they would be considered part of the pawning. In this regard, the Shāfi'īs ruled that fruits on the trees are not considered part of the pawning, whether or not they were manifest.



- This difference of opinion becomes clear in the case where the creditor is given access to a house to be pawned prior to the pawning, and then the debtor left the house after the pawning contract was concluded. In this case, the *Shāfiʿīs* and *Ḥanbalīs* render the pawning valid, while the *Ḥanafīs* ruled that the pawning is only valid if the creditor is given access to the house after the debtor had left it.<sup>66</sup>

### 70.6.3 Pawning fungible liabilities

The *Mālikīs* permitted pawning certain fungible liabilities, while the majority of jurists did not permit it. In what follows, we shall discuss in details the opinions of the four major Sunni schools regarding pawning fungible liabilities:

- The *Ḥanafīs* ruled that fungible liabilities may not be pawned, since they do not qualify as “property” in the proper sense of *māl*.<sup>67</sup> Moreover, they argued that fungible liabilities cannot be “received” in the conventional sense, which only applies to non-fungibles. Thus, if B owes \$100 to A, and A owes B 100 bushels of wheat, one of them may not consider his credit with the other a pawning in lieu of the other’s debt towards him. If that were permissible, it would have qualified as pawning the debt with the debtor.
- The *Shāfiʿīs* and the majority of *Ḥanafīs* ruled that a pawned object must be a non-fungible that can be sold.<sup>68</sup> Thus, they rendered pawning debts invalid, even if initiated by the debtor or creditor. They based this ruling on the view that such debts are undeliverable as pawned objects.

On the other hand, the *Shāfiʿīs* qualified their prohibition of pawning a debt, but stating that this prohibition applies only at the inception of the pawning contract. However, the majority of them did permit keeping a pawning contract intact as insurance for the repayment of his debt. They based this ruling on the fact that a debt may necessarily become a pawning, as evidenced by the fact that the pawning debtor may only absolve the creditor of his liability for the pawned object if the latter accepts.

However, it is not necessarily in this case to consider the guaranteed liability a pawning in lieu of the debt. In fact, it is merely a debt tied to the rights of the creditor, in analogy to the rights a creditor would share with the other creditors of a deceased debtor.

- The *Mālikīs* ruled that any object that may be sold, including debts the sales of which they allowed, may also be pawned.<sup>69</sup> Thus, they permitted

<sup>66</sup> Ibn Qudāmah (, vol.4, p.333,340), Al-Khaṭīb Al-Shirbīnī ((*Shāfiʿī*), vol.2, p.123).

<sup>67</sup> Al-Kāsānī ((*Ḥanafī*), vol.6, p.135), Al-Zaylaʿī ((*Ḥanafī Jurisprudence*), vol.6, p.69).

<sup>68</sup> Al-Khaṭīb Al-Shirbīnī ((*Shāfiʿī*), vol.2, p.122), Al-Buhūtī (3rd printing (*Ḥanbalī*), vol.3, p.307), Ibn Qudāmah (, vol.4, p.347 onwards), ʿAbū-ʿIshāq Al-Shīrāzī ((*Shāfiʿī*), vol.1, p.309).

<sup>69</sup> Ibn Ruṣṣd Al-Ḥafīd ((*Mālikī*), vol.2, p.269), Ibn Juzayy ((*Mālikī*), p.323), Al-Dardīr ((*Mālikī*)A, vol.3, pp.231,237), Al-Dardīr ((*Mālikī*)B, vol.3, p.310 onwards).



pawning debts from the debtor or from a third party. In this regard, we have already discussed the case of pawning a debt from the debtor. Pawning it from a third party may result thus: A may owe B, and C may owe A, in which case A may pawn C's debt (as established as a liability on C) with B in lieu of the debt he owes the latter. This pawning can be implemented physically by delivering to B the documentation or bill authenticating C's indebtedness to him, in lieu of A's debt to B.

In this regard, gaining possession of the documentation of C's debt and having witnesses thereof is considered a condition of validity for such pawning of debts. Moreover, whether the debts (the one that is pawned, and the one in lieu of which it is pawned) ensued from sales or loans, it is also a condition of validity that the pawned debt have a maturity date coinciding with or later than the maturity date of the underlying debt.

Thus, if the underlying debt had a later maturity date than the pawned debt, or if the pawned debt was already matured, the pawning is invalid. This ruling can be explained in each case separately, taking into account the fact that keeping a matured debt as a pawned object with the debtor is considered a loan. Thus, if both debts ensued from loans, then the pawning in this case would become lending in lieu of a loan. On the other hand, if the debts ensued from sales, then the pawning would combine a sale and a loan in one contract. Both such practices are forbidden in the Mālikī school.

#### 70.6.4 Pawning leased or lent non-fungibles

The major scholars of all schools allow a debtor to pawn his property with the creditor, even if that property was leased or lent to some party.<sup>70</sup> In what follows, we discuss in some detail the views of the various schools regarding the means of pawning such leased or lent items.<sup>71</sup>

- The Ḥanafīs permitted a debtor to pawn a lent or leased item to the borrower or lessee creditor, in which case they consider the possession of the simple loan or lease to substitute for the possession of pawning.<sup>72</sup> However, they ruled that if the two parties to the pawning contract agree to it, then the simple loan or lease is thus invalidated, while the pawning is considered valid. Thus, the object would thus be considered to be pawned in the creditor's possession, and neither lent nor leased, since an object cannot be simultaneously pawned and leased. On the other hand, they ruled that if a pawned object was leased after the establishment of the

<sup>70</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.146), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.269), Al-Dardīr ((Mālikī)A, vol.3, p.236), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.306), 'Ibn Qudāmah (, vol.4, p.334), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.128), Al-Bājūrī (5th printing (Shāfi'ī), vol.2, p.127), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.88).

<sup>71</sup>Note that pawning debts and pawning lent or leased non-fungibles belong to a more general principle of pawning legal rights.

<sup>72</sup>Note the statement in Al-Kāsānī ((Ḥanafī), *ibid.*): "The possession of pawning is weaker than the possession of lease" is questionable, since they are both possessions of trust.



pawning, then the pawning is invalidated and the leasing is valid, since pawning is not a binding condition while leasing is.

- The Mālikīs permit pawning a leased item to the lessee, in which case they consider the prior possession of lease to substitute for the possession of pawning. Moreover, they permit the debtor to pawn to his creditor a property that he had leased to another, provided that the creditor appoints a trustee to monitor the lessee and take the creditor's role as legal possessor of the leased object. In this regard, the lessee's receipt of the leased object was on his own behalf, and thus may not substitute for the creditor's receipt of pawning. The Mālikīs also permitted pawning agricultural land in the possession of a crop-sharing farmer, in analogy to their ruling on leased non-fungibles.
- The Ḥanbalīs permitted pawning properties that are leased, loaned, deposited, or usurped. In all such circumstances, they consider the prior receipt to substitute for the pawning receipt. We have already seen in such circumstances that the Ḥanbalīs do not require a second receipt to validate the contract.
- The Shāfi'īs also permitted pawning leased, lent, or deposited properties, provided that a sufficient time period for receipt would pass. In this regard, they ruled that if a lent or leased item is pawned to the borrower or lessee, both contracts persist since they see no contradiction between being a lessee and being in possession of a pawned object. On the other hand, they ruled that if the item were pawned to a creditor other than the lessee or borrower, then the pawning is valid provided that the creditor accepts the lessee or borrower as a trustee. Thus, both contracts (the pawning and the lease or simple loan) would persist, with the borrower or lessee being viewed as a trustee for both parties of the pawning contract. On the other hand, if the creditor does not accept the lessee or borrower as a trustee, then we need to consider two cases. If the lessee permits the pawning, then the lease is invalidated. However, if the lessee does not permit the pawning, then the pawning is invalidated. This is in contrast to the case of a simple loan, which is not binding, in which case the pawning invalidates the simple loan automatically.

### 70.6.5 Pawning borrowed items

Note that this case differs fundamentally from the one just discussed. The case of a pawning lessor, we considered a person who is pawning his own property. In contrast, we are not considering the case of a pawning lessee, who does not own the property he is leasing. In this regard, we have already seen that it is permissible for a debtor to pawn the property of another if he borrowed an item and decided to pawn it in lieu of his debt, with its owner's permission.<sup>73</sup> In this

<sup>73</sup>Ibn Qudāmah (, vol.4, p.344), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.269), Al-Buhārī (3rd printing (Ḥanbalī), vol.3, p.309).



regard, the owner of the pawned property is considered to have willingly given possession rights to the borrower. The owner has a right to give such possession rights only, as he is permitted to give both ownership and possession rights (e.g. by giving his property as a gift).

### **Ḥanafī rulings**

The Ḥanafīs and Shāfiʿīs ruled that if the owner of the pawned item authorized the loan and pawning without stipulating any constraints, then the borrower may be unconstrained as to whom he pawns the borrowed item, where he pawns it, and in lieu of which debt.<sup>74</sup> On the other hand, any constraints that the lender stipulates must be observed by the borrower. Thus, if the lender states the amount of debt in lieu of which he may pawn the lent object, then the borrower may not pawn it in lieu of a larger debt, nor for less if the size of the smaller debt is lower than the pawned object's value. This ruling follows since one whose dealings are authorized by another must abide by the conditions of that authorization, since the lender may have stipulated those conditions for an economic reason. Moreover, since a pawned item is guaranteed for the amount of the underlying debt, the owner would thus have decided the amount for which it may be pawned and thus guaranteed, and the borrower must abide by that decision.

On the other hand, if the borrowed item was of equal or lesser value than the pawned item, then the borrower is not considered to have violated the lender's condition. In this case, the deviation from the lender's condition benefits the latter, since he may recover the full pawned item in exchange for the smaller debt, and he suffers no loss if the pawned item were to perish, since his loss is thus smaller than the guaranteed amount.

However, if the lender restricts the borrower to pawn his property only in lieu of debts of a certain genus, he must abide by the condition. This ruling follows from the fact that debts in different genera vary in their ease of repayment. Similarly, if the lender restricts the borrower with regards to the location of pawning, or the set of creditors to whom he may pawn his property, then he must abide by that condition.

If the borrower violates one of the lender's conditions, and then the pawned property were to perish in the creditor's possession, then the lender has the option whether to demand compensation from the borrower or from the creditor. In the first case, he may consider the borrower to be a guarantor of his property by virtue of transgressing against it by violating his conditions. In this case, once the borrower pays the lender his due compensation, he is considered to have gained ownership of the borrowed item from the time he received it. On the other hand, the lender may decide to seek compensation from the creditor, by virtue of the fact that his property perished in his possession. The ruling in this case follows by analogy to the case of a usurper of a usurped object. Then, if the creditor compensates the lender, he may seek compensation from the pawning

<sup>74</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.136), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.88), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.365).



debtor. In other words, once the borrower violates the conditions of the lender, the pawning is invalidated, and the pawning borrower who transgressed becomes the ultimate guarantor of the property.

### **Mālikī ruling**

The Mālikīs agreed with the Ḥanafī and Shāfiʿī rulings in this case.<sup>75</sup> Thus, they ruled that if the borrower violated the lender's conditions, and then the lent object perished, was stolen, or suffered diminution, the borrower guarantees the object unconditionally by virtue of his transgression. On the other hand, if the lent object was not affected, then the borrower may return it and thus invalidate the loan.

### **Shāfiʿī and Ḥanbalī rulings**

The Shāfiʿīs and Ḥanbalīs ruled that a borrower is bound by the conditions of his lender.<sup>76</sup> However, they ruled that the borrower is not considered in violation of the condition if he was restricted with regards to the amount of the underlying debt, and pawned the borrowed item in lieu of a smaller debt. They based this ruling on the juristic ruling that a permission for the larger amount is implicitly a permission for the smaller. Moreover, they argued that the lender suffers no harm from the smaller size of the underlying debt, since they consider a pawned object to be a trust in the possession of the creditor.

### **Utilizing the borrowed property**

The Ḥanafīs considered the borrower of an item to pawn it to be a depositary prior to concluding the pawning, rather than a standard borrower. Thus, they ruled that the borrower of a property to pawn it is only permitted to use the property in the pawning, and may not utilize it otherwise prior to pawning it, or after regaining possession when the underlying debt is repaid. If he does utilize the borrowed property during such times, they thus rule that he is thus a transgressor who must guarantee it for the lender.

However, if the borrower utilizes the object and then pawns it, he is absolved of his guarantee, since he would thus have once again be abiding by the lender's condition. This ruling is based on analogy to the case of a depositary who may guarantee the deposit if he utilizes it, but then his guaranty is dissolved if he returns to acting in accordance with the depositor's wishes. This is in contrast to the case of a standard borrower, who would not be absolved of his guaranty if he transgresses and then returns to acting in accordance with the lender's wishes.

<sup>75</sup> Al-Dardīr ((Mālikī)A, vol.3, p.239).

<sup>76</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.129), 'Ibn Qudāmah (, vol.4, p.344 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.309), Al-Ramlī ((Shāfiʿī), vol.3, p.269).



### Types of guaranty

The Ḥanafis ruled that a borrower does not guarantee the property borrowed for pawning if it perishes in his possession prior to pawning it or after regaining possession when the underlying debt is repaid. This Ḥanafī ruling follows from the fact that the property would thus perish in the possession of a simple loan rather than the possession of a pawning. In this regard, we recall that the possession of a simple loan is a possession of trust in the Ḥanafī school.

This is in contrast to the views of the Mālikīs, the Shāfiʿīs, and most of the Ḥanbalīs. As we have seen in the chapters on simple loans that most Ḥanbalīs consider simply loaned properties to be guaranteed, while Mālikīs and Shāfiʿīs considered them to be guaranteed under certain circumstances.

On the other hand, the Ḥanafis ruled that if a property lent for pawning were to perish in the creditor's possession, then its owner is only entitled to the guaranteed amount, which is the lesser of its value and the value of the underlying debt. If the underlying debt was smaller than the value of the pawned object, then the Ḥanafis do not allow the owner to seek compensation for the difference from the borrower. This ruling is based on the Ḥanafī view that the difference as a loan, i.e. a trust, which may only be guaranteed if the borrower transgresses.

In contrast, the Mālikīs ruled that the owner may seek compensation from the borrower for the full value of the property on the day of the loan. On the other hand, the Shāfiʿīs and most of the Ḥanbalīs ruled that if the pawned object were to perish in the creditor's possession without transgression, then the pawning borrower must guarantee its value on the day it perished. This difference in rulings follows from the fact that the Ḥanbalīs consider simple loans to be guaranteed in all cases, while the Shāfiʿīs and Mālikīs consider it to be guaranteed in certain cases.

### Demands to release the pawned object

The Ḥanafis, Shāfiʿīs and Ḥanbalīs ruled that the owner of an object that was loaned for pawning may demand that the borrower release it from pawning at any time. This ruling follows from their view that simple loans are non-binding conditions, in which the lender may recollect his property at any time, even if the loan was initially timed. Then, once the pawning debtor releases the lender's property from pawning, he must return it to the lender. If the borrower is incapable of releasing the pawned property, then the lender may release it, and seek compensation from the borrower for the amount he paid the creditor to release his pawned property.

On the other hand, the Mālikīs ruled that the best supported ruling gives the lender the right to recall the object of any unrestricted simple loans. However, they did not permit such recalling if it occurred in a simple loan that is restricted with a condition or social custom, as we have seen in the chapters on simple loans.



### Leasing to pawn

Since it is permissible to borrow an item for pawning, it is equally permissible to lease an item for pawning.<sup>77</sup> In this case, if the leased item were to perish without any transgression, then it is not guaranteed. This ruling follows from the fact that all jurists view the possession of lease as a possession of trust, and not a possession of guaranty. In this case, the lessor is bound by the lease period, and thus does not have the right to release the pawned object prior to the lease period's expiration.

### 70.6.6 Pawning the property of others

We have already discussed some of the cases wherein a debtor may pawn another person's property if he acquired it through a lease or loan intended for that purpose. On the other hand, nobody is allowed to pawn another's property without being given some level of control over the pawned object. If a debtor pawns the property of another without first gaining legal control through legitimate means, then by delivering the pawned object he would be considered a usurper and a transgressor against the owner's property rights. The Ḥanafīs thus ruled that the pawning in this case would be suspended pending the owner's permission, and deemed invalid if the owner does not offer his consent. In the latter case, the pawning debtor would guarantee the pawned object as a consequence of his transgression.

The Ḥanafīs also ruled that if the pawned object perishes in the possession of a creditor who did not know that the property was not owned or under the legal control of the debtor, and then the creditor finds out, then the owner of the pawned property has the option of assigning guaranty to the debtor or to the creditor.<sup>78</sup> This ruling follows from the fact that both parties are considered transgressors against the owner's rights in this case: the debtor by pawning his property without his permission, and the creditor by receiving and holding the object.

In this case, if the owner receives compensation from the debtor, the creditor would thus be considered repaid up to the value of the pawned object, since it perished in his possession. This ruling follows from the fact that once the debtor pays compensation to the property's owner, he is retroactively considered its owner from the time he usurped it, i.e. before the inception of pawning. Consequently, he is considered in this case retroactively to have pawned his own property, and thus the creditor would be considered fully repaid if the pawned property's value equals or exceeds the debt, and up to the value of the pawned object if the latter is smaller than the debt.

On the other hand, if the owner seeks compensation directly from the creditor, the latter may seek compensation from the debtor for whatever compensation he paid the owner, in addition to seeking repayment of the debtor's debt.

<sup>77</sup> Al-Dardīr ((Mālikī)A, vol.3, p.236).

<sup>78</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.83 onwards), Al-Kāsānī ((Ḥanafī), vol.6, p.147).



The creditor's right to seek such compensation follows from the fact that he received the pawned object in this case through deception. As we know, a deceived party is always given the right to seek compensation from the deceiver for the effects of his deception. Moreover, the creditor is entitled to seek repayment of the debt, since the implicit receipt through pawning was negated when the pawning was proven to be invalid based on the violation of the owner's property rights. Thus, the creditor's right to demand repayment is reinstated after the pawning is invalidated.

In this case, the Ḥanbalis differentiated between the two cases where the creditor knows of the usurpation, and where he does not know:<sup>79</sup>

- If the creditor knew that the pawned object was usurped, and still accepted to hold the pawned object which then perished in his possession, then his guaranty is established irrevocably. Thus, the creditor in fact should return the pawned object to its rightful owner, otherwise he must guarantee it against all damage. The owner still has the option to seek compensation from the debtor or from the creditor. However, if he seeks compensation from the debtor, then the debtor may in turn seek compensation from the creditor, since the latter's guaranty was thus established.
- If the creditor did not know that the pawned object was usurped, and then the object perished in his possession, we need to consider the cause of perishing. Thus, if the pawned object perished due to the creditor's negligence or transgression, then he must guarantee it in analogy to the previous case.

However, if the pawned object perished in the possession of the deceived creditor, and not because of his own transgression or negligence, then there are three reported opinions in the Ḥanbalis school:

- According to the first opinion, the creditor's guaranty is still established irrevocably. This ruling is based on the view that the creditor transgressed by possessing the property of another without his permission, and then the property perished in his possession. Thus, this ruling assigns guaranty to the creditor in analogy to the case where he knows that the object was usurped. However, we must note that this view is not well supported, since the creditor in fact was not a transgressor, but had taken possession of the property with the debtor's permission, not knowing that it was usurped.
- According to the second opinion, the creditor is not assigned guaranty in this case. This ruling is based on the view that the creditor thus received the pawned object as a possession of trust, not knowing that the object was usurped. Thus, guaranty is assigned to the debtor.
- According to the third opinion, the owner of the pawned property has the option of seeking compensation from either party, but the

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<sup>79</sup>Ibn Qudāmah (, vol.4, p.397 onwards).



debtor is considered the irrevocable ultimate guarantor. This is the more reasonable opinion.

The opinion also applies to the case where a legal ruling was issued to assign ownership of the pawned object to a third party after the pawning took place. We must also note in all of the above that if the pawned object that is owned by a third party perishes in the creditor's possession, the Ḥanbalīs and Shāfi'īs do not consider the debt repaid. This ruling follows from their classification of the creditor's possession in this case as a possession of trust.

### 70.6.7 Pawning a pawned item

In this subsection, we consider the case of recursive pawning, a pawned object is pawned again, either all of it or part thereof. In what follows, we list the rulings of various schools for the two cases:

- If part of a property was pawned, and then another part of it was pawned, the rules of pawning unidentified portions of a property apply. Thus, the Mālikīs, Shāfi'īs, and Ḥanbalīs, all of whom permitted such pawning of unidentified portions, ruled that if an unidentified part of a property was pawned in lieu of one debt, then the rest of the property may be pawned in lieu of the same or another debt, and to the same or another creditor. However, if the rest of the property was pawned to a different creditor, it is necessary to obtain the second creditor's consent to the first creditor's possession,<sup>80</sup> or to appoint a trustee by mutual consultation of the debtor and the two creditors.

In contrast, we have seen that the Ḥanafīs do not permit pawning an unidentified portion of a property, and thus this case is never considered. In this regard, they would only consider pawning another part of a partially pawned property if the property was already divided, and each part was delivered separately, thus avoiding the current problem.

- The Ḥanafīs, Shāfi'īs, and Ḥanbalīs ruled that it is not permissible to pawn a property that is already pawned in its entirety in lieu of some debt.<sup>81</sup> They based this ruling on the fact that a second pawning of the property would be financially harmful for the first creditor to whom the financial aspect of the pawned property belongs. Thus, it is not permissible to give others (in this case a second creditor) any rights that contradict those of the first creditor.

However, if the first creditor approves the second pawning, they ruled that the second pawning is executed, and the first pawning is voided.

<sup>80</sup> Al-Dardīr ((Mālikī)B, vol.3, p.308).

<sup>81</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.147), Al-Ramlī ((Shāfi'ī), vol.3, pp.267,305), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.127), 'Ibn Qudāmah (, vol.4, p.347 onwards).



They also ruled that it is valid for a creditor in receipt of a pawned item to pawn it to another, provided that he has the permission of its owner (the original pawning debtor). In this case, they ruled that the first pawning is voided, and the second pawning is considered to be analogous to pawning an item that was borrowed for pawning. However, if the creditor were to pawn the object of the first pawning without its owner's consent, the second pawning would be deemed invalid, and the owner would thus have the right to demand the return of his property to the first creditor.

In those cases, if the pawned object were to perish in the possession of the second creditor, i.e. prior to returning it to the first creditor, then the Ḥanafīs ruled that the owner/debtor has the option of seeking compensation from either creditor. In this regard, their ruling follows the same rulings as in the case of pawning the property of another. Thus, if the owner sought compensation from the first creditor, the first pawning is deemed valid, since the value of the pawned object is considered to be pawned with him. However, if the owner decides to demand compensation from the second creditor, the first pawning would thus be invalidated, and the first creditor would be considered the ultimate guarantor of the pawned object. Thus, the second creditor may compensate the debtor, and then seek compensation from the first creditor based on the fact that he deceived him.

The Mālikīs ruled that it is permissible to pawn a pawned property, provided that its value exceeds the value of the first underlying debt.<sup>82</sup> In this case, the second pawning is considered to be justified by that excess of the pawned object's value over the underlying debt in the first pawning. The second pawning is thus given a secondary priority, whereby repayment of the first debt gets first priority if the object is sold, and then the second creditor becomes a residual claimant for any remaining proceeds. Thus, we can see that the first debtor's rights are not harmed, and hence his consent is not required for executing the second pawning.

On the other hand, the Mālikīs ruled that if the pawned object was in the possession of a trustee, then the second mortgage requires the trustee's consent to keep the trustee under the new circumstances. This ruling applies regardless of whether the second creditor is the same as or different from the first.

The Mālikīs have three reported opinions regarding the requirement of the first creditor's consent for the case of a second pawning to a second creditor. One opinion stated that the first creditor's opinion is not required, a second stated that it is required, and a third stated that the second pawning is impermissible regardless of whether or not the first creditor approved it. If the object is held by a trustee, then some of the Mālikīs chose the first of those two opinions, and some chose the second.

<sup>82</sup>c.f. Al-Dardīr ((Mālikī)A, vol.3, p.238). This permissibility of pawning pawned items (or having a "second mortgage" or "second lien") is in agreement with contemporary civil law.



In this regard, if a second pawning is permitted for a second creditor, then we need to consider the maturity dates of the two underlying debts. The simplest and most straight-forward case is the one where both debts have the same maturity date. On the other hand, if the second debt matured first, then the pawned object should be divided between the two debts, provided that such division does not reduce its value. Then, the first creditor should be repaid first, and then whatever remains may be given to the second creditor. Alternatively, if the pawned object was not divisible, then it may be sold, and the price may be used to repay the first debt first and then the second.

However, if the first debt had an earlier maturity date, then the pawned object may not be sold prior to its maturity. Then, once the first debt matures, the pawned object may be sold, and then sequentially repaid as before. Of course, if the object could be divided without reducing its value, then it may also be sequentially divided between the two debts, again giving priority to the first debtor.

In this regard, if the pawned object was possible to hide (e.g. clothes or jewelry), and if it were to perish in the first creditor's possession, he would not guarantee the excess of its value over his right to the second creditor, unless the object perished due to his transgression. This ruling follows from the fact that the first creditor is considered to hold the excess value inherent in the pawned object in a possession of trust.

### 70.6.8 Pawning part of an indebted estate

There are circumstances that prevent a pawning from taking place, such as when parties other than the pawning debtor have rights to the object of pawning. Those situations include the case we just studied of pawning a pawned object, as well as the case in this subsection of pawning part of an indebted estate. In this regard, we have already seen that pawning the properties of others is suspended pending the permission of the owner, and that ruling gives us a basis for the cases studied here. In what follows, we shall discuss the rulings of the various schools regarding pawning parts of an indebted estate:

- The Ḥanafīs ruled that if an heir pawns part of the inherited estate, and if the estate was tied to a debt established as a liability on the deceased, then the pawning is suspending pending relieving the estate from such debts. Once those debts are repaid, the object of pawning would be free of all rights other than its owner who may thus pawn it in lieu of his debts. This ruling is based on the view that debts of the estate prevent establishing ownership for the heirs. However, Ḥanafīs differed on this ruling if the debts were smaller than the value of the estate.
- The Mālīkīs ruled in this case that the pawning is valid, but suspended upon repayment of the debts of the estate. Thus, if the estate's debts are not repaid, the pawning of its components by an heir are voided, since



they agreed that debts established on the estate prevent the establishment of ownership for the heirs.

- Most Ḥanbalīs ruled that it is valid to pawn or sell components of an inherited estates, even if the deceased died with an established liability for a debt or unpaid *zakāh*.<sup>83</sup> They based this ruling on the view that ownership of the estate is transferred to the heir upon the death of the inherited party, and hence the heir is entitled to all the privileges associated with such ownership. In this regard, they distinguish between this case and the case of pawning an already pawned item, where the latter case involves the rights of others. In contrast, the debts of the deceased in the case of pawning parts of an estate were tied to the relevant properties as a matter of Law, and not due to any actions of the heir. In fact, this ruling applies in their school for all debts and rights that were established as a matter of Law (including *zakāh* and required compensations for various crimes) rather than through the actions of the heir. In all such cases, they permit pawning the properties to which such legal rights are attached.

In this case, they deemed the pawning valid, but continue to recognize the fact that the properties in the indebted estate are tied to the relevant debts of the deceased. Thus, if the heir were to fulfill the obligations of the estate from his own money after the pawning is concluded, the pawning remains intact. However, if the heir does not repay the debts associated with the estate, then the creditors of the estate may take the pawned items, since they have priority in collecting their rights.

This ruling is analogous to the case wherein an heir deals in the properties he inherited, and then an object that was sold by the deceased is returned based on a defect that was observed after his death. It is also analogous to the case where a legal right is attached to the estate after the death of the inherited party (e.g. if an animal falls in a well that he had dug outside his own land). In all such cases, the dealings of the heir are valid but non-binding. Thus, if the heir were to fulfill those rights from his own money, his dealings would thus be validated. Otherwise, if he does not fulfill those rights, his dealings would be voided.

In all of the preceding, we have been assuming that the heir pawns his part of the inheritance. Of course, if he pawns another part of the estate, he would be pawning the property of another person (a different heir), and the rulings for that case would apply.

- The Shāfiʿīs ruled that pawning parts of an indebted estate is invalid.<sup>84</sup> This ruling follows from the fact that they consider all dealings to be either valid and executable, or invalid.

For instance, they agree with the Ḥanbalīs in classifying the dealings of an un-commissioned agent as invalid. In the context of pawning parts of

<sup>83</sup>Ibn Qudāmah (, vol.4, p.350), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.316 onwards).

<sup>84</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.144 onwards), Al-Ramī ((Shāfiʿī), vol.3, p.304 onwards).



an indebted estate, the validity and executability of the pawning cannot be established due to the existence of debts attached to the estate. In this regard, while the debts do not deny the heirs' ownership of the estate, the estate is considered to be legally pawned, even without a formal pawning contract.

In this regard, most Shāfi'īs ruled that the issue of whether the debts exceeded the size of the estate or not was inconsequential. Thus, they forbid an heir from dealing in any part of an indebted estate, in analogy to their ruling that a debtor may not deal in the property he pawned in lieu of a debt as long as the debt is outstanding.

### 70.6.9 Pawning perishables

The Ḥanbalīs and other jurists ruled it is permissible to pawn highly perishable items, whether they can be stored if dried (e.g. grapes and fresh dates) or not (e.g. watermelons and non-storable cooked foods). In this regard, if the property was possible to store in a dried form, the pawning debtor must dry it to assist in making it less perishable. On the other hand, a pawned perishable property that cannot be dried must be sold, whether or not its sale was stipulated as a condition of the pawning. Then, the debt may be repaid with its proceeds if the debt matured before or immediately after the sale. If the debt was only scheduled to mature later, then the price of the perishable property would take its place as the object of pawning, based on convention. In this regard, the owner of the property normally strives to protect his property, and such protection can be accomplished by drying some fruits or feeding animals, or it may be accomplished by selling the property if it is highly perishable and cannot be preserved thus.

In contrast, the Shāfi'īs ruled that the permissibility of pawning perishable items that would be ruined prior to the underlying debt's maturity depends on whether or not selling the perishable item was stipulated as a condition.<sup>85</sup> Thus, they ruled that the pawning is permissible if there was a stipulated condition in the pawning that the perishable pawned goods may be sold to prevent their ruin. On the other hand, most Shāfi'īs ruled that if no such condition is stipulated, then pawning the perishable item is not valid. While some Shāfi'īs disagreed, the majority based their ruling of impermissibility on the view that selling the perishable goods in lieu of the underlying debt was not possible prior to the maturity of that debt, in analogy to the case where a condition was stipulated that the pawned goods may not be sold. However, if it is not known whether or not the pawned goods would perish prior to the debt's maturity, most Shāfi'īs ruled that an unconditional pawning is valid in this case. This last ruling follows from the view that the default case is one wherein the pawned object does not perish prior to the maturity of the underlying debt.

<sup>85</sup>Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.308), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.123 onwards).



### 70.6.10 Pawning fruit juices

It is permissible to pawn fruit juices, since it is permissible to sell them. In this regard, the fact that fruit juices can be fermented, and would thus cease to be legal properties, does not affect the validity of its pawning as a juice. Moreover, if the juices ferment to the point of becoming vinegar, the pawning is deemed to remain intact. On the other hand, if the pawned fruit juice ferments into wine or other intoxicants after receipt, it is necessary to throw it away, and the pawning contract would thus be considered non-binding. Then, once the intoxicant is disposed-of, the pawning is invalidated. In this case, the creditor has no options, since the pawned object is deemed to have perished (by becoming a non-property through fermentation) in his possession.

However, if the juice ferments into a wine prior to receipt by the creditor, the Ḥanbalīs ruled that the pawning is thus rendered invalid. In contrast, the Ḥanafīs, Mālikīs, and most Shāfiʿīs ruled that the pawning is not invalidated in this case. They based that ruling on the view that the Law forgives for the purpose of maintaining an existing contract more than it would forgive at the inception of a contract. Moreover, they argued that the juice was a valued property at the inception of the pawning, and it may yet have a value in the future [e.g., if it turns into vinegar].<sup>86</sup> Indeed, ʾIbn Qudāmah ruled that this is the best ruling, since it was agreed that the fruit juice would be re-instated as a valid pawned object upon turning into vinegar.

### 70.6.11 Pawning religious books

The Ḥanafīs, Mālikīs, and most Shāfiʿīs ruled that it is permissible to pawn written copies of the Qurʾān (*maṣāḥif*), books of Prophetic traditions, etc.<sup>87</sup> However, they ruled in this case that the creditor is not allowed to read the pawned books in his possession, since pawning only gives him the right to possess the pawned objects, but does not give him the right to use them. Thus, if the creditor uses the pawned objects and then they perish, he must guarantee their value, since he is considered a usurper by virtue of using them.

Most Ḥanbalīs ruled that pawning written copies of the Qurʾān is not valid, since selling them is not valid.<sup>88</sup> They thus based this ruling on the view that the purpose of pawning is to allow the creditor to collect repayment from the price of the pawned object, which requires its sale. Thus, since a copy of the Qurʾān cannot be sold in their view, there is not point in pawning it, which is thus deemed invalid. However, they allowed pawning books of Prophetic traditions and books of Qurʾanic exegesis, even to a non-believer, provided that such religious books remain in the possession of a Muslim trustee.

<sup>86</sup>ʾIbn Qudāmah (, vol.4, p.342), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.129), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.316).

<sup>87</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.146), ʾIbn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.269), ʾAbū-ʾIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.309), Al-Bājūrī (5th printing (Shāfiʿī), vol.2, p.126).

<sup>88</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.314), ʾIbn Qudāmah (, vol.4, p.343).



## Chapter 71

# Legal Status and Consequences

In this chapter, we shall study the legal status of valid pawning contracts, and those of defective invalid contracts. A valid pawning contract is one that satisfies all of the pawning contract conditions, while defective ones are those that violate some of the pawning contract conditions. In this regard, we recall that the Ḥanafīs distinguished among non-valid contracts between invalid ones and defective ones:

- A contract is invalid for the Ḥanafīs if it has a major defect at the foundation of the contract. Examples include contracts in which one of the contracting parties is ineligible due to insanity or mental incompetence, ineligibility of the pawned object (e.g. if it does not qualify as property), if the underlying right or liability is not possible to satisfy financially (e.g. a preemption right, or the right to exact bodily revenge), cases where pawning is meaningless (e.g. if it contains a condition that the pawned object in lieu of a debt may not be sold, or a condition that the creditor holding the pawned object should not have priority over other creditors).
- On the other hand, a contract is defective for the Ḥanafīs if it has a defect in its characteristics (e.g. if the pawned object is occupied by another un-pawned property). *Al-Nawādir* also listed a pawned object that are guaranteed by another property (e.g. as in the case of a sold object in the seller's possession) as an example of defective pawning. However, we have seen that most Ḥanafīs consider using the object of sale as a pawned object prior to receipt as a valid pawning contract.

In contrast, we know that the non-Ḥanafīs do not distinguish between defective and invalid contracts. Thus, while they differ in their choice of conditions for the validity of a pawning contract, each group considers contracts that do not specify their own conditions of validity to be defective and invalid.



### Status of valid pawning

In this subsection, we shall study the juristic opinions regarding the bindingness of valid pawning contracts, followed by ten studies of consequences of the pawning contract.

### Bindingness of valid pawning

A valid pawning contract is binding upon the pawning debtor, but not upon the creditor. Thus, the debtor does not have the right to void the contract, since it is a form of ensuring his debt to the creditor, while the creditor is permitted to void the pawning at any time, since it is a contract that is purely for his benefit.<sup>1</sup> All jurists agree that the consequences of the pawning contract are only realized by virtue of receipt. For instance, the creditor does not have an exclusive right to the price of the pawned object, and does not have priority over other creditors, except after he receives the pawned object.

Similarly, the majority of jurists ruled that the pawning contract only becomes binding upon the debtor after the creditor receives the pawned object, while the Mālikīs considered the contract binding upon completion of offer and acceptance, as detailed below:

- The Ḥanafīs, the Shāfiʿīs, and most of the Ḥanbalīs ruled that all valid pawning contracts become binding only after receipt. Thus, they allow the pawning debtor the option before delivery and receipt either to void the contract or to complete it.<sup>2</sup> We have previously listed their proof for this ruling based on the verse “then received pawned objects” [2:283], meaning “then, engage in a pawning wherein the pawned object is received by the creditor”. Thus, they argued that pawning was legalized based on the condition of receipt, and thus may not exist without that condition being satisfied. Further, they argued that pawning only becomes binding upon receipt based on the view that pawning is a voluntary contribution contract, and thus the pawning debtor should not be forced to engage in any action associated with the contract. This is in analogy to other voluntary contribution contracts such as gifts and charity, where the contract is considered non-existent prior to receipt. Thus, it is only through receipt that the pawning contract gains legal existence, becomes binding, and has legal consequences.
- In contrast, the Mālikīs ruled that a pawning contract becomes binding by virtue of the conclusion of offer and acceptance, and that receipt completes the contract.<sup>3</sup> Thus, they ruled that the contract is binding upon the pawning debtor upon the utterance of offer and acceptance, whereby he

<sup>1</sup>Abū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, pp.305,307).

<sup>2</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.340 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.63), ʿAbū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.305), Ibn Qudāmah (, vo.4, p.328 onwards).

<sup>3</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.270 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.240 onwards).



may be forced to deliver the pawned object unless one of the following four impediments exists:

1. Death of the pawning debtor after the contract conclusion but prior to delivery.
2. Demands by other creditors prior to delivery of the pawned object that the pawning debtor repay his debts to them.
3. Declaration of the pawning debtor's bankruptcy, in the sense that his debts exceed the total value of his property.
4. Terminal illness or insanity of the pawning creditor.

As we have seen previously, they ruled that the contract is binding upon its conclusion with offer and acceptance based on the verse "Oh believers, fulfill your contracts" [5:1]. Since this order makes it an obligation to fulfill all contracts, including pawning, they thus ruled that the pawning debtor is obliged to fulfill his obligations under the contract and deliver the pawned object.

### **Consequences of the pawning contract**

We now turn to ten consequences of the pawning contract that take effect after the contract is completed through delivery of the pawned object to the creditor:

1. Association of the underlying debt with the pawned object.
2. The right to keep the pawned object.
3. The obligation to safeguard the pawned object.
4. The obligation to pay the expenses associated with the pawned object.
5. Forbidding the pawning debtor to deal in the pawned object.
6. Forbidding the creditor to use the pawned object.
7. Guaranty of the pawned object (or the portion thereof corresponding to the debt in the Ḥanafī school).
8. Selling the pawned object, or demanding that the creditor sell it, to repay the underlying debt.
9. Giving the creditor in possession of the pawned object priority in repayment over other creditors.
10. The obligation to return the pawned object if the debt is repaid.



## 71.1 Association of the underlying debt

The general rule is that if a non-fungible property is pawned in lieu of some debt, the underlying debt is thus associated with the entire pawned object or all its units, which is not divided. Conversely, the pawned object is associated in pawning with all units of the underlying debt. Thus, if part of the debt is dropped through repayment or absolution, the rest of the debt must continue to be associated with the entire pawned object. In fact, this rule was implemented in the Egyptian and Syrian civil laws. In this regard, only the debt that was specified as underlying the pawning is associated with the pawned object, while other debts remain unattached to that object.

The creditor's right to keep the pawned object follows from this association of the object with the underlying debt. Thus, the creditor has the right to keep the entire pawned object in his possession until he recollects the entire debt, regardless of the possibility of dividing either.

All jurists agree on this general principle. However, they differed in opinion regarding its implementation, depending on their varying recognition of the pawning as a single pawning contract or multiple pawning contracts:

- The Ḥanafīs ruled that a contract is considered single if it has a single language, whether the underlying debts were many or one.<sup>4</sup> Thus, if the debtor in a single pawning contract repays some of the debts underlying the pawning, he is not entitled to collect a corresponding portion of the pawned property, even if the latter also consisted of multiple objects. Even if a single pawning contract were concluded with each of many debts being named corresponding to each of many pawned objects, they ruled that the debtor may not recover one of the pawned objects by repaying the corresponding debt. They based this ruling on the view that the contract in this case is unitary, and does not become multiple contracts by the sheer naming of multiple components.

This Ḥanafī ruling also applies regardless of whether the pawning debtor was unitary or multiple, and whether the creditor was unitary or multiple (as partners in one debt, or each being owed an independent debt by the pawning debtor). Thus, their general ruling is that if the pawning contract is unitary, no part of the pawned object may be recalled through partial repayment. In contrast, if multiple pawning contracts were written with separate contract languages, then each pawned object may be recalled by repaying the corresponding debt.

- The Mālikīs ruled that if the pawning debtors were multiple, or if the creditors were multiple, or both, then a single pawning contract is considered in fact to be multiple contracts.<sup>5</sup> However, if the contract names a single pawning debtor and a single creditor, then they rule that the pawning contract is unitary [regardless of the multiplicity of pawned objects

<sup>4</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.153), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.78).

<sup>5</sup> Al-Dardīr ((Mālikī)A, vol.3, p.257, 258).



and underlying debts]. Then, they ruled that if the pawning contract is unitary, then repayment of some part of the debt would make the entire pawned property associated with the remaining part of the debt, since each part of the pawned property was associated with each part of the debt.

However, if there are multiple pawning debtors, then each debtor may recollect his corresponding part of the pawned property upon repayment of his debt. Similarly, if the creditors are multiple, then the debtor may recollect a corresponding portion of his pawned property for repaying any one of them. In the latter case, if the pawned property was indivisible, and only one of the creditors was repaid, then the pawned property may be put in the possession of a trustee, or kept by the repaid creditor as a trust.

- The Ḥanbalīs agreed with those Mālikī rulings.<sup>6</sup> Thus, they ruled that the contract is divided into multiple contracts if the offerer or the acceptor of pawning consists of multiple parties. Thus, if an offer is made by one debtor to two creditors, or by two debtors to one creditor, there are in effect two contracts. If two debtors make an offer of pawning to two creditors, then there are in effect four contracts. On the other hand, if the debtor is unitary and the creditor is unitary, then the contract is unitary regardless of the multiplicity of debts or pawned objects.

Thus, if the contract is unitary, the debtor is not allowed to recall any part of the pawned property by virtue of paying part of the debt. However, if the contract is multiple by virtue of multiple debtors, then each debtor may recall his portion of the pawning upon repayment of his debt. Conversely, if the contract is multiple by virtue of multiple creditors, then the pawning debtor may recollect his portion of the pawning upon repayment of his debt to any of them.

Thus, if there are two debtors and two creditors, there are essentially four contracts. Thus one quarter of the pawned property would be considered to correspond to each of the four debts. Hence, if any debtor repays one quarter or more of the overall debt, a corresponding portion of the pawned property would thus be released from the pawning. This, according to the Justice 'Abū Ya'cālā, is the correct ruling.

- The Shāfi'īs ruled that the pawning contract is considered unitary or multiple depending upon whether the underlying debt is unitary or multiple, respectively.<sup>7</sup> In this regard, most of them ruled that the debts are multiple if the debtors are multiple, even if they have a common agent. This is in contrast to sales contracts, wherein the number of individuals directly involved in the contract determines the multiplicity. They based their

<sup>6</sup>Ibn Qudāmah (, vol.4, pp.346,402).

<sup>7</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.141 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.307).



ruling on the view that pawned property is a form of insurance of the underlying debt, and thus multiplicity of the debts would imply multiplicity of the insurance documents. In this regard, they ruled that in most cases, multiplicity of the debtors or creditors implies multiplicity of the debts. The reason this case can be contrasted with the case of sales is that sales contracts are contracts of guaranty, and thus the directly active parties in such contracts determine their multiplicity.

The Shāfiʿī opinion in this case differs from the Mālikīs and Ḥanbalīs in the case of pawning in lieu of a single debt to two joint creditors. Since the Shāfiʿīs ruled that the multiplicity of creditors generally implies the multiplicity of debts, they ruled in this case that repayment of one of the two joint creditors would entitle the debtor to recalling a corresponding part of the pawned property. In this case, the debtor must clearly identify one of the creditors as the recipient of debt-repayment, otherwise, he would not have certainly repaid one of them completely. On the other hand, if a person borrows a property from two people to pawn it, and then repays half of the debt, then half of the pawned property would be released from the pawning.

In summary, all jurists agreed that the criterion for judging whether or not a portion of the pawned property is released from pawning is based on the multiplicity of the pawning contract. In this regard, the Ḥanafīs ruled that multiplicity of the contract can only be established through multiple contract languages, regardless of the number of contracting parties. On the other hand, the Mālikīs and Ḥanbalīs considered the multiplicity of contracting parties to be the main criterion for judging the multiplicity of pawning contracts. Finally, the Shāfiʿīs ruled that the main criterion is the multiplicity of underlying debts. However, the Shāfiʿīs also ruled that multiplicity of debtors or creditors most often implies multiplicity of debts, and thus rendered their rulings in this regard very similar to those of the Mālikīs and Ḥanbalīs.

## 71.2 The right to hold the pawned object

The association of the pawned object with the underlying debt implies the creditor's right to hold the pawned object as a means of getting the debt repaid. In this regard, the association of the underlying debt with the pawned object is only established in a secure manner if the creditor in fact holds the pawned object to urge the debtor to repay his debt lest the creditor may sell it to collect his money. Thus, associating the underlying debt with the pawned object and the creditor's holding of the object are equal forms of ensuring debt repayment.

Thus, the Ḥanafīs ruled that validity of a pawning contract implies establishment of the creditor's right to hold the pawned object permanently until the debt is repaid.<sup>8</sup> Thus, the creditor has the right to prevent the debtor from recollecting his property prior to repaying his debt. They based this ruling on the

<sup>8</sup>Al-Sarakḥṣī (1st edition (Ḥanafī), vol.21, p.63), Al-Kāsānī ((Ḥanafī), vol.6, p.145), Al-



view that pawning is a form of insurance of debt repayment, which insurance requires holding the pawned property that may be used to extract repayment.

The Ḥanafis further ruled that the right to hold the pawned object is established upon establishment of the creditor's right to extract repayment from the pawned object. In this regard, extraction of repayment would normally require ownership and possession of the object from which repayment is to be extracted. However, since the valid Ḥadīth: "A pawned object does not become the creditor's property if the debt is not paid", ownership of the pawned object cannot be established for the creditor. Thus, the creditor is only granted possession of the object from which repayment may be extracted. Indeed, that view is reflected in the lexical meaning of "pawning" (*rahn*), which implies possession of the pawned object. As we have previously seen, the legal characteristics of contracts often follow their linguistic titles.

Moreover, since the pawned object has a financial property characteristic, and since repayment is normally extracted from that financial aspect of the pawned object, the creditor is entitled by virtue of the underlying debt to hold an equivalent portion of the financial aspect (value) of the pawned property. Thus, if the property's value exceeds the underlying debt, the excess amount is considered to be held by the creditor in a possession of trust.

The Shāfi'is, Mālikis, and Ḥanbalis ruled that the purpose of pawning is the same as the purpose of other forms of documentation and insurance of debts, i.e. to increase the means by which the underlying debt may be repaid. Thus, the creditor has an established right to associate the underlying debt with the pawned object, and another established right to extract repayment from that object's financial value by selling it and having a first claim on its price.

However, the Shāfi'is ruled that the creditor's right to hold the pawned item is not binding on the pawning debtor. Thus, they permit the debtor to recollect the object he pawned to use it (provided that its use does not harm it), and then he may return it to the creditor when he extracts the usufruct he sought. As proof of this ruling, they cite the Ḥadīth: "A pawned object does not become property of the creditor, and the pawning debtor retains rights for its output and obligations for its expenses". This Ḥadīth implies that the creditor is not allowed to withhold the pawned object from the pawning debtor, to whom the Prophet (pbuh) referred as the object's owner entitled to its output and obligated for its expenses.

Moreover, the Shāfi'is argued that permanent withholding of the pawned object is contrary to the documentation and insurance objective of the pawning contract. In particular, they cite the Ḥanafī ruling that the debt is dropped if the pawned item perishes, which means that the contract may make debt repayment less rather than more likely. Moreover, they argued that withholding the pawned item would make it impossible for any party to extract the object's usufruct, which results in a forbidden waste of resources.

In summary, the majority of jurists ruled that the pawning contract estab-

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Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.64 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, pp.194-6), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.345).



lishes the creditor's right to permanent withholding of the pawned object until repayment. However, the Shāfi'is ruled that the contract only gives the creditor the right to sell the identified pawned object to extract debt repayment.

The opinion of the majority of jurists is more correct. He bases this opinion on the fact that this majority ruling is more in accordance with the actual implementation of pawning, which involves the creditor's withholding of the pawned object to give the debtor an incentive to repay the underlying debt. In fact, we have seen in the section on conditions of receipt that this is the foundation of the Mālikī and Ḥanbalī requirement of the permanency of receipt until the debtor repays the underlying debt.<sup>9</sup>

The juristic difference in opinion between the Ḥanafīs and Shāfi'is, with regards to whether the pawning contract's essence is withholding of the pawned object or simply identifying it for the purpose of selling if the debt is not paid, gave rise to a number of differences in rulings:

1. The Ḥanafīs do not allow the pawning debtor to recollect the pawned property for use, since they argued that such recollection would contradict what they view to be the essence of pawning, i.e. the creditor's withholding of the pawned object. In contrast, the Shāfi'is allow such recollection, since they do not consider it to be contrary to the essence of the contract in their school, which is identifying the pawned object for possible sale if the debt is not paid.
2. The Ḥanafīs ruled that any non-contiguous growth in the pawned object is still considered part of the pawning, and thus ruled that such growth must be withheld by the creditor. However, the Shāfi'is ruled that such non-contiguous growth is not part of the pawning, and thus may not be sold in lieu of the underlying debt.
3. The Ḥanafīs did not permit pawning an unidentified portion of a property, since permanent withholding of such a portion without withholding un-pawned property is impossible. However, the Shāfi'is, Mālikīs, and Ḥanbalīs all permitted pawning such unidentified portions of properties, based on the permissibility of their sale, which thus enables the identification of such an unidentified portion for sales and the extraction of debt repayment from its price.

### 71.2.1 Demanding repayment

The Ḥanafīs ruled that once the underlying debt is matured, creditor may demand repayment of the debt while continuing to withhold the pawned object.<sup>10</sup> Then, if the debtor decides to repay the debt, he may demand that the creditor bring the pawned object to prove that it is intact, provided that it is not too

<sup>9</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.272), 'Ibn Qudāmah (, ibid., p.331), Al-Kḥaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.131,133).

<sup>10</sup>Al-Kāsānī ((Ḥanafī), vol.6, pp.148,153 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.343 onwards), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.58).



costly or cumbersome to bring the pawned object (e.g. if it need not be transported to a different city). On the other hand, if it is costly or cumbersome to bring the pawned object to the debtor, the creditor is not required to do so prior to receiving full repayment. In the later case, the creditor is only required to give the debtor access to the pawned property, without necessarily bearing the cost of transporting it to the location of debt repayment. However, if the pawning and the debt recollection all take place in the same city, then the creditor is required to bring the pawned object to the repayment session, since the cost is minimal in this case. Finally, if the pawned object is held by a trustee, then the creditor is not required to bring the pawned object, since the trustee would in fact be forbidden from giving the pawned object to either party of the pawning, lest he would guarantee it and the party that collects it be considered a usurper.

In summary, if the debtor seeks repayment in the same city of the pawning, and demands to see the pawned object, then the creditor must bring it. Otherwise, the creditor is required to bring it if it can be transported with little cost and effort, otherwise he is not. In this regard, 'Ibn 'Abidīn ruled that the main consideration is the cost of transportation of the pawned object (regardless of location), whereby the creditor is required to bring the pawned object if the cost of transportation is minimal, and not required otherwise. This latter opinion seems to be the best and most accurate.

### 71.3 Safeguarding the pawned property

The Ḥanafīs ruled that establishment of the creditor's right to hold the pawned object implies that he may safeguard it in any manner that he safeguards his own property. Thus, he may safeguard it himself, have his wife safeguard it, have a cohabitating child or servant safeguard it, or have his agent safeguard it. They based this ruling on the view that the possession of the pawned property is a possession of trust, and thus may be safeguarded it in the same manners permissible for deposits.

On the other hand, they ruled that the creditor must guarantee the value of the pawned property if he does not safeguard it in one of the aforementioned methods. Thus, if he deposits it with someone, or is otherwise negligent in its safeguarding, he must guarantee its value, no matter how large. If he deposits the pawned object with another party, and then the object were to perish, then the Ḥanafī jurists differed over the object's guaranty. In this case, 'Abū Ḥanīfa ruled that the creditor is the one who guarantees the pawned object, and not the depositary. In contrast, 'Abū Yūsuf and Muḥammad ruled that both parties must thus guarantee the object. The latter two based this ruling on the fact that the creditor must guarantee the object by virtue of forwarding it to the depositary, while the depositary must guarantee it by virtue of taking it from a party other than its owner. However, the latter two ruled that the creditor remains the ultimate guarantor, in analogy to the ruling for a depositary's depositary.



Moreover, all Ḥanafīs agree that the creditor may travel with the pawned object, even if its transportation is costly and burdensome, as long as the travel route is safe. This ruling was also based by analogy to the corresponding ruling for deposits.<sup>11</sup>

## 71.4 The pawned objects expenses

All jurists have agreed that the pawning owner of a property is responsible for its expenses, based on the Ḥadīth: “A pawned object does not become property of the creditor, and the pawning debtor retains rights for its output and obligations for its expenses”.<sup>12</sup> However, jurists differed in their specification of the types of expenditures for which the pawning debtor is obligated:

- The Ḥanafīs ruled that expenses of the pawned property must be divided between the pawning owner and the holding creditor responsible for its upkeep and safeguarding, in the following manner:<sup>13</sup>
  - The general rule is that the pawning owner is responsible for all expenditures needed for the benefit and upkeep of the pawned property, while the creditor is responsible for any expenditures needed for safeguarding it.
  - Thus, the pawning debtor is responsible for the feed and drink, and the wages of a shepherd, of a pawned animal. Similarly, the pawning debtor is responsible for watering, pollination, and pruning pawned trees, watering and upkeeping pawned lands, as well as paying any taxes associated with the land. All such expenses are necessary to upkeep the pawned property, and thus must be borne by the owner.
  - The pawning debtor may not deduct the pawned property’s expenses from it or from its growth, unless he first receives the creditor’s permission to do so. This ruling follows from the fact that the entire pawned property is associated with the creditor’s right of debt repayment, and hence selling any portion to spend on the rest of it would be considered a transgression against the creditor’s right. Thus, the creditor’s right is necessary for such deduction of expenses to be permitted.

<sup>11</sup> Ibn ʿĀbidīn ((Ḥanafī), vol.5, pp.345,347 onwards), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.64 onwards), Ibn Al-Humām ((Ḥanafī), vol.8, p.202).

<sup>12</sup> We have discussed the chains of narration of this Ḥadīth previously. It was narrated by Al-Shāfiʿī, Al-Dāraqutnī, and others on the authority of ʿAbū Hurayrah. Al-Dāraqutnī said that this Ḥadīth had a good and contiguous chain of narrators, c.f. Al-Shawkānī (, vol.5, p.235). Criticisms that the end of this Ḥadīth was in fact not part of what the Prophet (pbuh) said, but a continuation by Ibn Al-Musayyab, were rebuffed by the fact that other narrators confirmed the full narration through a chain of narrators that reaches uninterrupted up to the Prophet (pbuh).

<sup>13</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.151), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.68), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.61), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.346), Ibn Al-Humām ((Ḥanafī), vol.8, p.202).



- On the other hand, the creditor must bear all expenses of safekeeping the pawned property, including the expenses of its location of storage. This ruling implies that the pawning contract may not include a stipulated condition of compensating the creditor for his safekeeping expenses. This ruling was based on the view that safekeeping the pawned object is a duty of the creditor, and one should not be paid a wage to fulfill one's duty. However, it was narrated that 'Abū Yūsuf ruled that rental payments for the place used to safeguard the pawned property must be borne by the pawning debtor, thus arguing that such expenses are necessary for upkeeping the pawned property.
- If the pawned object is lost or falls sick, then the cost of returning it or curing it, respectively, must be borne by both the debtor and the creditor. The cost is thus divided between the two parties based on their guaranty. Thus, the creditor must bear all such expenses up to the amount of underlying debt, and then the rest must be borne by the pawning debtor.<sup>14</sup> This ruling follows from the fact that the creditor guarantees the pawned object up to the value of the underlying debt, and holds the rest as a trustee.
- The Mālikīs, Shāfi'īs, and Ḥanbalīs ruled that the pawning debtor must bear all the expenses of the pawned property, including upkeeping expenses, safekeeping expenses, and medical treatment expenses.<sup>15</sup> They based this ruling on the previously listed Ḥadīth that explicitly stated that the pawning debtor is the object's owner, who is thus entitled to its output and responsible for its expenses. However, the three schools differed in opinion over the course of action to be taken if the pawning debtor refuses to pay those expenses. Thus:
  - The Mālikīs ruled that if the debtor does not pay for the upkeeping expenses of the pawned property, the creditor may pay the necessary expenses and then seek compensation from him for the full amount he paid, even if it exceeds the value of the pawned object. Thus, they ruled that such expenses would be established as a debt on the pawning debtor, whether or not the pawning debtor gave his permission to the creditor to pay those expenses. In this regard, the creditor is considered to be performing a duty of the debtor, and the liability for those expenses must be established as a liability on the debtor, and not associated to the pawned object itself.
  - The Shāfi'īs ruled in this case that the judge must force the pawning to pay the pawning object's expenses if he is present and can afford it. If the pawning debtor was absent, then the judge may take the

<sup>14</sup>However, the ruling listed in *Al-Fatawā Al-Bazzāziyyah* stated that physician and medication costs must be borne by the creditor.

<sup>15</sup>Al-Dardīr ((Mālikī)A, vol.3, p.251 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.136), 'Ibn Qudāmah (, vol.4, p.392), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.326 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.314).



expenses out of his property. On the other hand, if the pawning debtor cannot afford the pawned object's expenses, then the judge may take one of three actions: (i) he may borrow to pay the expenses, (ii) sell part of the pawned property to pay the expenses, or (iii) order the creditor to pay the expenses and establish them as a debt on the pawning debtor. In the latter case, wherein the creditor pays the expenses, he is thus entitled to demand compensation from the debtor, provided that he acted with the judge's permission, or with witnesses of his expenditure. In the case of relying on witnesses to establish the pawning debtor's liability for the expenses, the creditor must tell the witnesses that he is only paying those expenses with the understanding that he will seek compensation from the debtor.

- The Ḥanbalīs ruled that if the creditor is capable of seeking the debtor's permission to pay the pawned property's expenses, but pays them without seeking such permission, then he is considered a voluntary charitable contributor and loses his right to demand compensation. However, if he was incapable of seeking the debtor's permission (e.g. if the debtor was absent), then he may seek compensation only up to the lesser of what he actually spent and the normal expenditures required for similar objects. In the latter case, the creditor needs only to have the prior intent of seeking compensation for the expenses, but does not need a judge's permission or witnesses.

## 71.5 Utilization of the pawned property

It is not permissible to let the usufruct of the pawned object go to waste. Thus, the pawned object must be utilized while the object is pawned. Thus, we need to study rulings related to pawning debtor utilization, and to creditor utilization of the pawned property.

### 71.5.1 Pawning debtor utilization

The Shāfi'īs ruled that the pawning debtor is authorized to utilize the pawned object, as long as the utilization does not harm the creditor. In contrast, the non-Shāfi'ī jurists ruled that the pawning debtor is not permitted to utilize the pawned object during the pawning.<sup>16</sup> We now discuss the views of each of the four schools:

- The Ḥanafīs ruled that a pawning debtor may only use the pawned property with the creditor's permission. Similarly, they ruled that the creditor is only allowed to utilize the pawned property with the pawning creditor's permission.<sup>17</sup>

<sup>16</sup>Ibn Hubayrah ((Ḥanbalī), vol.1, p.238).

<sup>17</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.146), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.342 onwards).



Their proof of the first ruling is the permanency of the creditor's right to withhold the pawned object from the pawning creditor, thus forbidding the debtor from reclaiming the object for use. If the pawning debtor actually benefits from the pawned object without the creditor's permission (e.g. drank the milk of a pawned cow), he must guarantee the value of the benefits he extracted. In the latter case, he is considered a transgressor against the creditor's right. Then, the paid value of the usufruct extracted by the debtor becomes part of the pawning, and thus becomes attached to the underlying debt.

If the pawning debtor actually takes the pawned object to use it without the creditor's permission (e.g. by riding a pawned animal), the creditor's is absolved of his guaranty, and the debtor is considered a usurper of the pawned property, who thus may be forced to return it to the creditor. Indeed, if the property perishes in the debtor's possession in this case, it would perish in his own property.

However, if the pawning debtor can benefit from the pawned property without taking possession of it (e.g. if the pawned property was a machine that is being used), then its output and/or growth belongs to the pawning debtor.<sup>18</sup> Thus, if the creditor were to take such output or growth, it would be cancelled against a corresponding portion of the underlying debt. Those rulings are based on the view that all increases of the pawned property are considered part of it, whether such increases are contiguous or separate.

- The Ḥanbalīs agreed with the Ḥanafīs that the pawning debtor is only allowed to use the pawned property with the creditor's permission.<sup>19</sup> In this regard, they ruled that if the debtor and creditor cannot agree on authorizing one or the other to benefit from the property, then the property would remain unused, despite the Law's aversion to such waste. This ruling is based on the view that a pawned object is by definition withheld from the pawning debtor, in analogy to a sold item that is withheld by the seller until its price is paid. Thus, the Ḥanbalīs rulings are also in agreement with the Ḥanafī view that all the usufruct of a pawned object, or any growth thereof, is considered part of the pawning.

However, the Ḥanbalīs do permit the pawning creditor to care for the pawned object and protect it. For instance, they allow the pawning debtor to provide medication to a pawned animal, or to arrange for the fertilization of a pawned cow.

- The Mālikī rulings in this regard were more strict than the Ḥanafī and Ḥanbalī rulings.<sup>20</sup> In fact, they ruled that the pawning debtor is not allowed to use the pawned object in any way, and considered a creditor permission for such usage to be invalidating for the pawning contract, even

<sup>18</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.370).

<sup>19</sup>Ibn Qudāmah (, vol.4, p.390 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.323).

<sup>20</sup>Al-Dardīr ((Mālikī)A, vol.3, p.241 onwards).



if the debtor does not act upon that permission. They based this ruling on the view that if the creditor gives the debtor his permission to use the pawned object, he would thus be abandoning his right.

However, since usufruct of the pawned object is owned by the pawning debtor, the latter may allow the creditor to extract such usufruct on his behalf, to ensure that the usufruct is not wasted. In this regard, if the creditor lets the object's usufruct to go to waste (e.g. by locking a pawned house), some of the Mālikīs ruled that he must thus compensate the debtor for the rental value corresponding to the wasted usufruct. A second group of Mālikīs ruled that the creditor is not required to compensate the debtor in this case, since he is not required to utilize the debtor's property on his behalf. A third group of Mālikīs ruled that the creditor should compensate the debtor for wasting his property's usufruct, unless the debtor knew of the situation and did not complain.

- The Shāfi'īs disagreed with the other three schools by ruling that a pawning debtor is permitted to extract all usufruct from the pawned object, provided that his utilization of the property does not diminish it in any way (e.g. riding pawned animals, living in pawned houses, etc. are allowed).<sup>21</sup> They based their ruling on the view that all the usufruct and/or growth in the pawned object are owned by the pawning debtor, and not associated with the debt. As proof to this view, they cited the Ḥadīth narrated by Al-Dāraqūṭnī and Al-Ḥākim: "A pawned riding animal is available for riding while pawned, and a pawned dairy animal is available for milking while pawned", as well as the Ḥadīth narrated by Al-Bukhārī: "A pawned riding animal can be used for riding, in compensation for its expenses".

In contrast, they did not permit unauthorized use of the pawned object if it decreases its value. For instance, they did not permit building on pawned land or planting trees therein. In this regard, the creditor's permission is required to protect his rights, and the creditor is allowed to withdraw his permission before the debtor proceeds with the authorized action.

Moreover, the Shāfi'īs ruled that if the debtor can utilize the pawned property without recalling it from the creditor (e.g. leasing a pawned machine while it is in the creditor's possession), then he should not recall it. However, if recalling the property is necessary to extract usufruct (e.g. taking possession of a pawned car to drive it), then he may recall it thus, since gaining possession is necessary to extract the usufruct. In the latter case, the pawning debtor must return the pawned property immediately after extracting its usufruct.

### 71.5.2 Creditor utilization of the pawned property

The non-Ḥanbalī jurists ruled that a creditor is not permitted to utilize the pawned property in any way. In this regard, they explained the Ḥadīth re-

<sup>21</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.131 onwards).



garding the right to ride or milk pawned animals in return for their expenses to the case where the pawning debtor refused to pay such expenses. In the latter case, if the creditor were to bear those expenses that should have been borne by the debtor, he may extract an amount of usufruct commensurate with his expenditure. In contrast, the Ḥanbalīs ruled that the creditor may utilize the pawned property if it is a riding or dairy animal, in which case he may extract usufruct equal in value to his expenditures on the animal.<sup>22</sup> In what follows, we shall list the rulings of the four schools in some detail:

- The Ḥanafīs ruled that the creditor is not permitted to utilize the pawned property in any way without the debtor's permission.<sup>23</sup> They based this ruling on the view the creditor's right to withhold the pawned property, but not to use it. Thus, if the creditor utilized a pawned object, and then the latter perished while being used, he is considered a usurper and must thus guarantee all of its value.

Some Ḥanafīs ruled that the creditor is generally permitted to utilize the pawned object if he is given permission by the pawning debtor, while other Ḥanafīs forbade such creditor utilization unconditionally, based on the need to avoid any similarity to *ribā*, regardless of permissions. A middle group argued as follows: If the pawning contract stipulates a condition that the pawning debtor must allow the creditor to utilize the pawned object, then the contract is rendered forbidden based on *ribā*. Similarly, if the contract is forbidden if the condition to permit creditor utilization is not stated explicitly, but understood conventionally to hold. The latter ruling is based on the view that conventionally understood conditions are similar to explicitly stipulated ones. On the other hand, they argued that utilization based on a pawning-debtor's permission is permissible if that permission was not stipulated in the contract. In this last case, the permission is considered a voluntary contribution from the pawning debtor.

Indeed, the third Ḥanafī view that differentiates between the conditional case and the voluntary case seems to capture the spirit of Islamic Law. In this regard, we note that most people lend an item with the understanding of permitting the recipient to use the lent property. This conventional understanding is tantamount to a stipulated condition, which makes it necessary for the jurist to forbid the practice, as 'ibn 'Abidīn said.

In this regard, it is necessary in matters of religion to err on the side of caution. Thus, the Ḥanafī juristic rule of "every loan that benefits the lender is *ribā* should be applied. Indeed, 'Ibn Nujaym ruled explicitly that he considers a creditor's use of the pawned property to be reprehensible to the degree of prohibition.<sup>24</sup> We read the following in *Al-Tatārkhāniyyah*:

<sup>22</sup>'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.273).

<sup>23</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.342), Al-Kāsānī ((Ḥanafī), vol.6, p.146), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.67), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.102).

<sup>24</sup>Syrian and Egyptian laws agree with Shari'ah in this regard, since both laws state that



“If a person borrows some money, and gives his donkey to the creditor to use it for two months until he repays his debt, or gives him his house within which to dwell until repayment, the contract is tantamount to a defective lease. Thus, if the creditor does in fact use the pawned property, he must pay the market rental value of the usufruct he extracted, and the contract is not considered a pawning”. Thus we see that the common contemporary practice of pawning a house with the creditor of a loan to use for the duration of the loan in fact renders the loan forbidden for all schools of jurisprudence. In particular, the contract cannot be viewed as a trust sale, since those participating in such practices do not intend to engage in sales.

- The Mālikīs stipulated a number of rulings for various different scenarios.<sup>25</sup> Thus, they ruled that the debtor’s permission, or the creditor’s condition, to utilize the pawned object is permissible if the pawning period is specified, and the underlying debt was established through a sale or other commutative contract. If those conditions are satisfied, the two contracts would be a sale (by virtue of which the debt was established) and a lease with known term, which is permissible. In this regard, Al-Dardīr ruled that it is permissible for the creditor either to extract the pawned object’s usufruct without paying any compensation, or with such compensation deducted from the underlying debt, while the rest of the debt is repaid as soon as possible.

On the other hand, the Mālikīs ruled that creditor utilization of the pawned object is not permissible if the underlying debt was established through a loan. In this case, such utilization would render the underlying loan one which benefits the creditor, which is a form of *ribā*. Moreover, they ruled that if the underlying debt was established through a loan, then creditor utilization of the pawned object is still not allowed if the debtor gave it to him as a gift, since the Prophet (pbuh) forbade the gifts given by debtors to their creditors.<sup>26</sup>

In summary, one can envision eight scenarios in which the creditor may utilize the pawned property, of which seven are forbidden and only one is permissible. Four of the forbidden scenarios involve an underlying loan, wherein the period of utilization may be known or uncertain, and wherein the utilization was stipulated as a contract condition or given voluntarily as a gift from the debtor. Three more forbidden scenarios involve an underlying debt from sale, wherein the debtor gives the usufruct as a gift of known or unknown duration, or wherein utilization was stipulated as

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the recipient of a pawned property is not permitted to utilize that property without paying a commensurate compensation.

<sup>25</sup> Al-Dardīr ((Mālikī)A, vol.3, p.246), ‘Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.273), ‘Ibn Juzayy ((Mālikī), p.324).

<sup>26</sup> Al-Bukhārī narrated in his *Tārīkh* on the authority of ‘Anas (mAbpwh) that the Prophet (pbuh) said: “If someone lends another, let him not take a gift from the debtor”, i.e. prior to repayment of the debt, c.f. Al-Shawkānī (, vol.5, p.231).



a condition but the term of utilization was not certain. Thus, the only permissible scenario is the one wherein creditor utilization of the pawned object was stipulated as a condition, and its term was stated explicitly. In the latter permissible case, the condition must mention whether the creditor may thus utilize the pawned property without compensation, or whether the commensurate compensation would be deducted from the debt, with the rest of the debt repaid as soon as possible.

- The Shāfiʿī jurists largely agreed with their Mālikī counterparts<sup>27</sup> that the default ruling is impermissibility of creditor utilization of the pawned property, based on the above mentioned Ḥadīth. A translation of the Ḥadīth along the explanation given by ʿIbn Masʿūd would read: “A pawned property does not become the property of the creditor; and the pawning debtor remains its owner, thus entitled to all its benefits and responsible for its expenses”. This is a more reasonable understanding of the Ḥadīth than the understanding given by Al-Shāfiʿī that the owner is only entitled to any increase in the pawned property, and responsible for any diminution therein.

The Shāfiʿīs further ruled that if the creditor stipulated in the underlying loan any condition that harms the pawning debtor, e.g. that increases in or usufruct of the pawned property would belong to himself, then the condition is invalidated, and most Shāfiʿīs ruled that the pawning is also invalidated. This ruling is based on the Ḥadīth: “Any condition that is not in the Book of Allāh is invalid”. The jurists who ruled that the pawning would also be rendered invalid by such a condition based their ruling on the contradiction between this condition and the nature of pawning, in analogy to conditions that result in harm for the creditor.

On the other hand, if the usufruct was of known amount, and the pawning was stipulated as a condition in a sale contract, then it is permissible in that condition to give the creditor rights to the usufruct. This would be a case of combining a sale and a lease in one contract, which is permissible. Another permissible example of such a combination would be selling a horse for \$100 on condition that the buyer would lease his house to the seller for one year in exchange for those \$100. In this example, part of the horse is given as an object of sale, and the other part is given as a rental payment in exchange for the usufruct of the house.

Finally, they ruled that if utilizing the pawned property was not stipulated in the contract, the creditor may still utilize the pawned property by permission of the pawning debtor. This ruling follows from the fact that the pawning debtor is the owner of the pawned property, and may thus give anyone he wishes a permission to use it. In this regard, they argued that neither party’s rights are wasted in this scenario, since the debtor

<sup>27</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.61), ʿIbn Hubayrah ((Ḥanbalī), vol.1, p.238), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.121).



maintains ownership, and the creditor maintains possession of the pawned property.

- The Ḥanbalīs ruled that it is not permissible for the creditor to utilize pawned properties other than animals that require feeding, unless the debtor gives his permission for such utilization.<sup>28</sup> They based this ruling on the fact that the pawned object, together with any increases and all its usufruct, is a property of the pawning debtor, and thus may not be taken without his consent.

Moreover, they ruled that it is not permissible for the creditor to utilize the pawned property without paying compensation, even if the debtor gives his permission thus, if the underlying debt resulted from a loan. The latter case is clearly forbidden as a loan that benefits the lender. In this regard, 'Imām 'Aḥmad said: "I hate loans in which a house is pawned for use by the creditor, for it is unadulterated *ribā*". In contrast, if the underlying debt resulted from a sale or lease, then the creditor is permitted to utilize the pawned property, even if he is given a favorable lease rate.

However, it is permissible for the creditor to utilize the pawned property in exchange for its market-based rental rate, regardless of whether the underlying debt resulted from a loan or a sale. In this last case, the lender would thus be engaged in a lease contract, rather than benefiting from the loan.

Of course, in the case of pawned animals, they ruled based on the above listed Ḥadīth that the creditor may ride or milk the animal in compensation for the feed he spends on it. In this case, they ruled that the creditor should be careful that the amount of usufruct he extracts is commensurate with the cost of feeding the animal, since the Ḥadīth stated: "It is permissible to ride a pawned riding animal, or to drink the milk of a pawned dairy animal, and the one who rides it or drinks its milk is responsible for its expenses". Moreover, since utilization of the animals in exchange for feeding them is a form of commutative contracts, it is necessary that the two compensations be equal. However, 'Ibn Al-Qayyim disagreed with this final ruling in *'Aḥlām Al-Muwaqqi'īn*, saying: "It is not necessary to make the two compensations equal in this case, since the Legislator has deemed the two compensations qualitatively equal, and it is difficult for us to ascertain quantitative equality between such disparate things as riding and milking on the one hand and feeding on the other".

It is noteworthy that the majority of jurists did not accept the above mentioned Ḥadīth, since they argued that it was abrogated. In this regard, they argued that the Ḥadīth was abrogated by the Ḥadīth: "It is not

<sup>28</sup>Ibn Qudāmah (, vol.4, p.385 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.342 onwards). In this regard, they explicitly stated that: "the creditor is not permitted to benefit from the pawned property in any way, unless the pawned property is a riding or dairy animal, in which case they may ride it or milk it to an extent that matches the amount of feed they spend on it".



permissible to milk the sheep of any person without his permission”,<sup>29</sup> as well as the Ḥadīth: “A pawned property does not become property of the creditor; and the debtor remains its owner, thus entitled to its output and responsible for its expenses”.

The Ḥanbalīs answered those criticisms by arguing that Sunnah is a fundamental source of legislation, which thus cannot be negated by other sources. Moreover, they argued that the Ḥadīth claimed to abrogate their proof is general, while the Ḥadīth they cited regarding pawning is more specific, and thus the more specific should restrict the understanding and application of the more general Ḥadīth.

The Ḥanbalī exception to the general Ḥadīth seems reasonable in this case. In this regard, the Ḥadīth used by the Ḥanbalīs as proof of their ruling is a valid Ḥadīth, and thus must be observed. However, outside the narrow scope of that Ḥadīth, we accept the position of all four schools. Indeed, the Ḥanbalīs themselves ruled that: “If a condition is stipulated in a pawning contract that the creditor is permitted to utilize the pawned property, then the condition is defective based on contradicting the consequences of the pawning contract. On the other hand, if the underlying debt resulted from a sale, then it is permissible to allow the creditor to utilize the pawned property, since the situation in this case is in fact a sale and a lease in one contract, in accordance with the Shāfi‘ī ruling”.

## 71.6 Dealing in the pawned property

In what follows, we discuss the dealings of the pawning debtor, as well as dealings of the creditor, in the pawned property.

### 71.6.1 Pawning-debtor dealings

#### Prior to receipt

The Ḥanafīs, Shāfi‘īs, and Ḥanbalīs ruled that any dealings of the pawning debtor prior to delivery of the pawned property may be executed without the creditor’s consent. They base this ruling on the view that the creditor does not have any rights attached to that property prior to delivery and receipt.

On the other hand, we have seen that the Mālikīs rendered a pawning binding upon conclusion of the offer and acceptance.<sup>30</sup> Thus, they ruled that the pawning debtor can be forced to deliver the pawned property to the creditor by virtue of the concluded pawning contract (through offer and acceptance). However, despite those rulings, the Mālikīs still allow the pawning debtor to deal in the object of pawning prior to its receipt by the creditor. Thus, if the debtor by virtue of a loan or sale were to sell the object of a stipulated pawning

<sup>29</sup>Narrated by Al-Bukhārī in his chapter on types of injustice on the authority of ‘Ibn ‘Umar, c.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.51).

<sup>30</sup>Al-Dardīr ((Mālikī)A, vol.3, p.248).



in the underlying contract, the sale is executed if the creditor was not diligent in demanding receipt of the pawned property. Thus, the underlying debt would not be insured with a pawning, due to the creditor's negligence that allowed the debtor to sell the object of pawning.

However, if the creditor were in fact diligent in demanding receipt of the pawned property, but the debtor proceeds to sell the pawned property before delivering it to the creditor, the Mālikīs have expressed three opinions:

- 'Ibn Al-Qaṣṣār ruled that if the sold object of pawning remained in the debtor's possession, the creditor is entitled to void the sale, which is thus not executable. On the other hand, if the object was already delivered to the buyer, the sale is deemed executed, and the object's price takes its place as the object of pawning.
- 'Ibn 'Abī Yazīd ruled that the sale is executed in all cases, and its price takes its place as the object of pawning.
- 'Ibn Ruṣḥd ruled that the sale is thus executed, but the underlying debt is thus deprived of insurance through pawning. In other words, he ruled that the object's price does not replace it as the object of pawning.

There is also a difference in opinion regarding the case of voluntary pawning after the underlying contract is concluded. In this case, the Mālikīs agree that if the debtor sells the object of pawning prior to its delivery to the creditor, the sale is deemed executed. However, the jurists differed in opinion over whether or not the object's price replaces it as the object of pawning, in accordance with their rulings regarding the sale of gifts prior to their receipt.

### After receipt

Once the pawned property is delivered to the creditor, the underlying debt becomes associated with it, despite the debtor's maintenance of ownership rights. Thus, the Ḥanafīs ruled that the creditor is entitled to withhold the pawned property from the debtor as insurance against the underlying debt, until the latter is repaid. On the other hand, the non-Ḥanafīs ruled that the pawned property is thus identified for possible sale to insure repayment of the underlying debt. Both rulings imply that the debtor is thus not allowed to deal in the pawned property without the creditor's consent. This ruling follows from the fact that all schools agree that delivery of the pawned property associates legal rights of the creditor to that property, and hence his permission to drop that right must be obtained. In what follows, we shall discuss the views of the various schools in some detail:

- The Ḥanafīs ruled that if the pawning debtor sells the pawned property without the creditor's permission, then the sale is suspended due to the association of its object with the rights of the creditor.<sup>31</sup> Then the sale

<sup>31</sup> Al-Kāṣānī ((Ḥanafī), vol.6, p.146), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.224), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.84), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.361), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.59).



would become valid and executable if the creditor permits it, the debtor repays the underlying debt, or the creditor absolves the debtor of his debt. In the two cases not involving debt repayment, most Ḥanafis ruled that the object's price replaces it as the object of pawning, since compensations in sale generally take the legal status of what they compensated for. Moreover, this ruling is based on the view that the creditor's right is attached to the financial aspect of the pawned property, and thus his rights are not harmed if the object of pawning is replaced by its price.

On the other hand, most Ḥanafis ruled that if the creditor does not permit the sale, the latter is not voided, but becomes suspended. In that latter case, if the buyer did not have prior knowledge of the pawning, he is given an option of waiting until the pawned property is released from pawning, or asking a judge to void the sale.

If the debtor were to sell the pawned property for a second time (while the first sale is suspended), then the second sale is also suspended pending the creditor's permission. In this case, the creditor is given the option of permitting either one of the two sales and voiding the other. On the other hand, if the second dealing of the debtor (while the first sale is suspended) was a gift, lease, or second pawning, then the creditor's consent would render the first sale executable, voiding the later dealings. This ruling follows from the fact that consenting to any of the other dealings involves dropping the creditor's right to withhold the pawned property, which thus removes the legal impediments to executing the sale. Moreover, this ruling transfers the creditor's rights to the price obtained from the sale, while the other dealings would not bring any financial benefit to the creditor.

Similarly, if the pawning debtor were initially to lend, lease, pawn, or give the pawned property as a gift, his dealings are deemed suspended pending the creditor's permission:

- In the case of lending a pawned property, the simple loan is executed if the creditor permits it, and voided otherwise. However, the pawning contract is not voided if the simple loan is permitted, since simple loans are non-binding contract, and thus both the debtor and the creditor have the right to recall the lent property and re-establish its pawning.
- In contrast, leasing is a binding contract, and thus if the debtor leased his pawned property and the creditor consented to the lease, then the pawning is invalidated.
- If the other party to the debtor's loan, lease, pawning, or gift is the creditor himself, then the same rulings apply as before. Thus, if the creditor with whom the property is pawned is the buyer or the gift recipient, then the pawning is invalidated.

If the creditor is the borrower of the pawned property, the pawning is not voided, but he no longer guarantees the pawned and lent property



if he utilizes it. Thus, if the property were to perish during his use in this case, it would perish in a possession of trust. However, if it perished before or after the property's use, it would perish as an object of pawning.

If the creditor is also a lessee of the pawned property, and if the two parties satisfy the formality of renewing his receipt for the purposes of leasing, the lease is executed and the pawning is voided. This ruling follows from the fact that the possession of a pawned property is weaker than the possession of a leased property, and thus may not take its place. This fact can be deduced from the fact that the possession of a pawned property does not authorize the possessor to use the property, while the possession of lease does authorize the possessor thus, and hence it is the stronger of the two possessions. In this regard, if a formal new receipt is established for the lease, and the pawned object perished afterwards, it would thus perish in a possession of trust, which is guaranteed only against the holder's transgression or negligence. One form of transgression in this case is forbidding the debtor to regain possession after the end of the lease period.

- The Mālikīs ruled that all unauthorized dealings of the debtor in the pawned property, including sales, leases, gifts, charity, simple loans, etc. are deemed suspended pending the creditor's permission.<sup>32</sup> Thus, the creditor would be given the option of voiding the contract, and maintaining the pawning, or permitting the debtor's dealing. In this regard, most Mālikīs ruled that if the creditor gives his consent to the debtor's dealing in the pawned property, then the pawning is invalidated, even if the debtor does not in fact conclude the dealing. This ruling is based on the view that such a consent implies dropping the creditor's rights associated with the pawning.
- The Shāfi'īs ruled that the debtor is not permitted to deal in pawned property (that he had already delivered) in any manner that transfers its ownership (e.g. sales, gifts, etc.) to a party other than the creditor without his permission.<sup>33</sup> They base this ruling on the view that validating such dealings would in fact nullify the insurance against the underlying debt. Similarly, they ruled that the debtor is not permitted to pawn an already pawned property with a different creditor, or to lease the pawned property if the debt's maturity date precedes the end of the lease period. In such cases, the debtor's dealings are deemed invalid.

However, the dealings are valid if the other party to the lease, sale, or other contract is the creditor, or if the creditor gave his permission to

<sup>32</sup> Al-Dardīr ((Mālikī)A, vol.3, pp.241 onwards, 248), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.247), 'Ibn Juzayy ((Mālikī), p.324).

<sup>33</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.130 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, pp.309,311).



concluding the contract with a third party. In both cases, the pawning is thus voided, except in the case of leasing, wherein the pawning remains intact. In the latter case, we have already seen that the pawning debtor is permitted to take any actions that do not harm the creditor (e.g. living in a pawned house, or riding a pawned animal). Consequently, the debtor is also allowed to lease the pawned property or lend it for a period that ends prior to maturity of the underlying debt, since the creditor's rights to sell the property and collect repayment of the underlying debt remain intact.

- The Ḥanbalīs agreed with the Shāfi'īs that debtor dealings in the pawned property without the creditor's permission are invalid.<sup>34</sup> They based this ruling on the view that such dealings as sales, leases, gifts, establishing trusts, pawning, etc. would void the creditor's rights of insuring the underlying debt. On the other hand, they ruled that if the creditor permits such dealings, then the dealings are deemed valid and the pawning is voided, with the exception of the cases of leasing and simple loans.

Thus, in summary, unapproved debtor dealings in the pawned property is considered by the Ḥanafīs to be suspended, and by the other jurists to be invalid.

### 71.6.2 Creditor dealings

We have already seen that the pawning-debtor maintains ownership rights to the pawned property, while the creditor maintains rights to withhold the property, the financial value of which is deemed to be insurance against the underlying debt. Consequently, the creditor is not permitted to deal in the pawned property without the owner-debtor's consent. Thus, the Ḥanafīs and Mālikīs consider his unauthorized dealings in the pawned property to be suspended in analogy to the dealings of unauthorized agents. In contrast, the Shāfi'īs and Ḥanbalīs render such unauthorized dealings of the creditor to be invalid. In what follows, we shall discuss the views of the various schools in some detail:

- The Ḥanafīs ruled that that creditor is only entitled to hold the pawned property, but may not deal in it without the debtor's consent.<sup>35</sup> Thus, if the creditor were to deal with the pawned property in a sale, gift, charity or simple loan, his dealings would be suspended pending the debtor's permission. Thus, if the debtor approves the dealing, it would be executed, and if he does not approve it, the dealing would thus be invalidated.

The exception to this rule is the case of leasing the pawned property, in which case the rent belongs to the creditor if the debtor did not authorize the lease, and belongs to the debtor if he authorized it. In either case, the pawning is invalidated.<sup>36</sup>

<sup>34</sup>Ibn Qudāmah (, vol.4, p.363), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.321 onwards).

<sup>35</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.146), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.139,342 onwards).

<sup>36</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.342,372).



Then, if the creditor deals in the pawned object, and then it perishes in the possession of the party to whom it was dealt, we need to consider different scenarios:

- The debtor has an option if the creditor had sold the pawned object, given it as a gift or charity, or lent it. In those cases, the debtor may seek compensation from the creditor based on his transgression, in which case he is considered the ultimate guarantor of the property, who by compensating the debtor is retroactively considered to have dealt in his property. Alternatively, the debtor may seek compensation from the recipient of the pawned property, in which case neither party may seek compensation from the creditor. In the latter scenario, each party is considered to be dealing on his own, with the recipient of the pawned property being a recipient on his own behalf, whether or not he was aware of the creditor's transgression. Moreover, the recipient of the property through a sale or gift thus accepted guaranteeing the property, whether or not the property was owned by the creditor. Similarly, a borrower would thus have received the property to extract usufruct without paying compensation.
- If the creditor leased, deposited, or pawned the pawned property with another, and then the property perished in the other party's possession, the debtor has a different option. He may seek compensation from the creditor, in which case he is established as the ultimate guarantor, who by paying compensation is rendered retroactively as the property's owner. Alternatively, he may seek compensation from the recipient of the property, who may in turn seek compensation from the creditor. In the latter case, the recipient of the property is not considered to be acting on his own behalf, but rather acting on behalf of the depositor, second pawning party, or lessor, and maintaining the property for the creditor's benefit. Thus, the creditor becomes the ultimate guarantor of the property in those cases, unless the property perished due to the ultimate recipient's transgression, in which case the latter is considered the ultimate guarantor.

We note further that once the debtor determines the party from whom he seeks compensation, he may not revert to seeking compensation from the other. In this context, seeking compensation from either party is tantamount to giving him ownership rights, which may not later be transferred to another without the new owner's consent. Moreover, by seeking compensation from one party, the debtor would implicitly be testifying that that party is the transgressor on his rights, and thus absolving the second party irrevocably.

- The Mālikīs ruled in agreement with the Ḥanafīs that the creditor is not allowed to deal in the pawned property without the pawning debtor's permission, since he would thus be dealing in what he does not own.<sup>37</sup> Thus, if

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<sup>37</sup>Al-Dardīr ((Mālikī)A, vol.3, p.242).



the unauthorized creditor were to deal with the pawned property through sales, gifts, leases, or loans, the dealing would be deemed suspended pending the debtor's permission, in analogy to their ruling on the dealings of unauthorized agents.

On the other hand, if the creditor deals thus with the debtor's permission, the contract is executed. However, if the dealing is a sale, a gift, or a lease that ends after the underlying debt's maturity, then the pawning is voided. Also, the pawning is voided if the lease ends prior to the debt's maturity, but the lessee is not required by condition or convention to return the property to the creditor at the end of the lease. However, the pawning is not voided if the dealing is a lease that ends prior to maturity of the underlying debt and the lessee is bound by convention or condition to return the property to the creditor at the end of the lease.

- The Ḥanbalīs and Shāfi'īs ruled that the creditor is not allowed to deal in the pawned property without the pawning debtor's permission, since he is not the owner of that property.<sup>38</sup> Thus, if the creditor were to deal in the debtor's pawned property, the dealing is rendered invalid, and the pawning remains valid. In contrast, if the creditor deals in the pawned property with the debtor's permission, his dealing is executed, and the pawning is voided if the dealing implies transfer of ownership to the recipient (e.g. as in sales or gifts). However, if the creditor's dealing is a lease or loan, the pawning is not invalidated, whether or not the lessee or borrower is the pawning debtor.

In the meantime, the Ḥanbalīs ruled that the bindingness of the pawning contract is dissolved upon dealing in the pawned property, as if the property was never received in pawning. Then, if the property is returned to the creditor's possession, the pawning is reinstated. On the other hand, the Shāfi'īs who do not require permanency in receipt consider the pawning in such cases to continue as if the property was in the creditor's possession throughout.

## 71.7 Guaranteeing pawned property

In this section, we shall discuss three aspects of pawned property guaranty:

- The nature of the creditor's possession of the pawned property.
- Types of guaranty for the Ḥanafīs and non-Ḥanafīs.
- Consumption of the pawned property.

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<sup>38</sup>Ibn Qudāmah (, vol.4, p.331), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.131).



### 71.7.1 The creditor's possession

The Ḥanafīs viewed the creditor's possession of pawned property to be a possession of trust, while the non-Ḥanafīs viewed it as a possession of guaranty. In what follows, we shall discuss the rulings of the various schools in some detail:

- The Ḥanafīs ruled that the creditor's possession is a possession of trust with regards to the pawned property itself, but a possession of guaranty and repayment of the underlying debt with regards to the financial aspect of the pawned property, up to the value of the underlying debt.<sup>39</sup> In other words, the creditor guarantees the pawned object's value up to the equivalent of the underlying debt. Thus, if the pawned perishes, the debt would be considered repaid out of the creditor's guaranty of an equal part of the value, and the rest of the value is considered to perish like other trusts that are guaranteed only by transgression or negligence.

The proof for this ruling is the Ḥadīth: "If a pawned property perishes, it perishes in cancellation with the underlying debt".<sup>40</sup> They also offer as proof the narration that a creditor once received a pawned horse, and then when the horse died in his possession, the Prophet (pbuh) told him: "Your right has thus perished".<sup>41</sup> In this regard, the Ḥanafīs interpreted the first Ḥadīth in the context where neither party could ascertain the perished pawned property's value, and thus it would be cancelled against the underlying debt.<sup>42</sup>

- The non-Ḥanafīs ruled that the creditor's possession of a pawned property is a possession of trust, which is guaranteed only by transgression or negligence.<sup>43</sup> Thus, absent any transgression or negligence, no part of the debt would be dropped by virtue of the pawning object perishing.

Their proof for this ruling is the previously quoted Ḥadīth of 'Abū Hurayrah: "The pawned property does not become the property of the creditor when the underlying debt matures; and the debtor remains its owner who is entitled to its output and responsible for its expenses". Thus, they interpret this Ḥadīth to state that all expenses (including the total loss of value upon perishing) of the pawned property are a liability on the

<sup>39</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.342), 'Abd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.2, p.55), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.198), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.63), Al-Kāsānī ((Ḥanafī), vol.6, p.154).

<sup>40</sup>There are two narrations of this Ḥadīth in Al-Dāraquṭnī and 'Abū Dāwūd; the first is a weak narration on the authority of 'Anas, while the other is a valid Ḥadīth with an incomplete transmission chain, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.321).

<sup>41</sup>Narrated by 'Abū Dāwūd in his *Marāsīl* and by 'Ibn 'Abī Shaybah in his *Muṣannaf*, as a weak Ḥadīth with an incomplete chain of narrators, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.321).

<sup>42</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.348).

<sup>43</sup>Al-Dardīr ((Mālikī)A, vol.3, pp.253-5), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.273), 'Ibn Juzayy ((Mālikī), p.324), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.136), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.316), 'Ibn Qayyim Al-Jawziyyah ((Hanbalī)a, vol.4,p.35), 'Ibn Qudāmah (, vol.4, p.396), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.328).



pawning debtor. This in turn implies that the pawned property must be perishing in a possession of trust, and not a possession of guaranty, lest the creditor be the one responsible for the loss. Moreover, they argued that pawning is a means of ensuring repayment of the underlying debt, and thus that underlying debt cannot be dropped by virtue of the property's perishing. Finally, they argued that the creditor gained possession of the property with the pawning debtor's consent, and thus his possession is a possession of trust, in analogy to the possession of a depositary. Indeed, we can see that the non-Ḥanafī jurists' proofs are stronger, while the Ḥanafī proofs rely on weak Ḥadīths. Thus, we find the majority opinion in this case to be more credible.

Despite this ruling, the Mālikīs preferred to consider the creditor a guarantor if there is a suspicion of possible transgression or negligence (e.g. if the pawned property can be hidden, e.g. jewelry, clothes, etc.), and if the property was in the creditor's possession. However, they ruled that the creditor does not guarantee the property if it was in the possession of a trustee, or if two witnesses (or one witness and the creditor's oath) can be provided to testify that it perished without any transgression or negligence on the creditor's part. Moreover, they ruled that the creditor is not responsible for any compensation if the pawned property was observable (e.g. real estate, or an animal).

### 71.7.2 Types of guaranty

#### Ḥanafī rulings

The Ḥanafīs ruled that a pawned property is guaranteed for the smaller of its value and its underlying debt. Thus, if the pawned property's value was smaller than the underlying debt, the property is considered to be guaranteed up to its value. In this case, if the pawned property perishes, a part of the debt equal to its value would be cancelled, and the creditor may demand repayment of the remaining amount of the debt. If the value of the pawned property was equal to the underlying debt, then they cancel each other if the pawned property were to perish. In this second case, the value of the pawned property is considered a liability on the creditor, which may thus be cancelled against the debtor's liability for an equal debt. Finally, if the value of the pawned property was greater than the underlying debt, then the excess of its value over the debt is considered to be in a possession of trust, which is only guaranteed against the creditor's negligence or transgression.<sup>44</sup>

In this regard, the Ḥanafīs stipulated three conditions for the types of guaranty discussed in the previous paragraph:<sup>45</sup>

1. The underlying debt must be in existence at the time when the pawned property perished. Thus, if the debt is dropped through repayment or

<sup>44</sup>c Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.55), Al-Kāsānī ((Ḥanafī), vol.6, p.160).

<sup>45</sup>Al-Kāsānī ((Ḥanafī), vol.6, pp.155-60), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.240).



absolution, and then the pawned property perishes, the pawning debtor is not entitled to any compensation from the creditor.

2. The pawned property must have perished in the possession of the creditor or a trustee. Thus, if the pawned property perishes in the possession of the debtor or a usurper, it would not perish as pawned property. Rather, the property would thus be guaranteed by the debtor if it perished in his possession, and by the usurper if it perished in his.

This ruling also applies to the case where the debtor utilizes the pawned property with the creditor's permission, and then it perishes while he is utilizing it. Then, the property would perish as a trust, and no part of the debt would be cancelled in lieu of its perishing. This ruling is based on the view that the property would thus perish in the possession of a simple loan rather than the possession of pawning. However, if the property were to perish in this case before or after the debtor's utilization, it would perish in a possession of pawning. Similarly, if the debtor or creditor lend the pawned property to a third party, and it perishes in his possession, then it would perish as the object of a simple loan. Finally, if the creditor deposits the pawned property with the debtor, and it perishes in his possession, no part of the debt would be dropped in compensation. In this last case, the pawning possession would thus be negated by delivering the pawned property to the debtor.

3. The perished part of the property must be part of the originally pawned property, i.e. it must not be an increase or output of the pawned property (e.g. offspring, milk, fruits, wool, etc.) that was associated with it *ex post*. Thus, if the increase or output of the pawned property perishes, it perishes in a possession of trust, since such increases are not part of the original pawning, and thus the creditor's possession thereof is derivative of his possession of the originally pawned property.

The majority of Ḥanafīs ruled that diminution in the price of pawned property does not result in its guaranty, in contrast to Zufar who ruled that it does. The majority opinion is based on the view that dropping any part of the underlying debt is usually determined by the corresponding value of the pawned property at the time of its receipt, and not at the time it perishes. This ruling in turn follows from the fact that receipt of the pawned property is tantamount to a form of repayment, and thus its value at that receipt time is the most important consideration. Thus, if that value is subsequently diminished by changes in market prices, no part of the debt is dropped in compensation for that reduction in value.<sup>46</sup>

On the other hand, if the pawned property consisted of multiple units, and parts of it perished in the creditor's possession, or if otherwise becomes defective in the latter possession, an equal amount of the underlying debt is cancelled in compensation to the reduction in the pawned property's value. The rest of the

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<sup>46</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.91).



pawned property would thus be considered to remain in pawning corresponding to the remainder of the underlying debt.

An exception to this rule is the case where the pawned properties were *ribawī* goods measured by volume or weight, and the underlying debt was denominated in the same genus (e.g. gold for gold or silver for silver), then 'Abū Ḥanīfa ruled that any perished part of the pawned property would be cancelled against an equal volume or weight of the underlying debt.<sup>47</sup> In this regard, the quality of the underlying debt and pawned property is irrelevant, since such considerations are ignored in *ribawī* goods of the same genus.<sup>48</sup>

However, if the pawned property and the underlying debt were of different genera (e.g. one was wheat and the other gold), then the perished pawned property would be assessed in terms of value, in analogy to all other non-*ribawī* properties.

### Non-Ḥanafī rulings

The non-Ḥanafī jurists ruled that pawned property is only guaranteed against the creditor's transgression and/or negligence.<sup>49</sup> Thus, barring any negligence or transgression, no part of the debt would be cancelled against diminution of the pawned property.

However, we have already summarized the Mālikī views regarding pawned properties that can be hidden, wherein the creditor must guarantee the pawned properties unless he can provide proof that it perished due to causes other than his own transgression or negligence. If the creditor guarantees the pawned property, he would continue to do so until he delivers it back to the debtor, i.e. the guaranty would not be dropped through debt repayment or dropping. If the pawned property perished in the creditor's guaranty, the underlying debt would thus be dropped if it is equal to the property's value. In this regard, some Mālikīs ruled that the value of the pawned property is determined on the day of its loss, and others ruled that it is determined on the day of the pawning.<sup>50</sup> In this regard, they ruled that guaranty would imply that one party should pay the excess of the debt or the value of pawned property to the other. Thus, if the debt was larger, the creditor may demand repayment of the remainder of the

<sup>47</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.212), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.74),  
<sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.57).

<sup>48</sup>'Abū Yūsuf and Muḥammad ruled that the creditor must guarantee the value of pawned property if the underlying debt was of a different genus. In this case, they ruled that the compensation for perished pawned property takes its place as the object of pawning in the creditor's possession.

<sup>49</sup>Ibn Qudāmah (, vol.4, p.396), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.137), 'Ibn Juzayy ((Mālikī), p.324), Al-Dardīr ((Mālikī)A, vol.3, p.344), Ibn-Ruṣḥd Al-Qurṭubī ((Mālikī), vol.2, p.367).

<sup>50</sup>Al-Dardīr ((Mālikī)A, vol.3, p.253), which stated that there were two decisions in the school regarding determining the value of the pawned property on the day of its pawning or the day of its perishing. He then stated that some Mālikīs tried to reconcile the two opinions by saying that the value is considered on the day the property perished if it was observed to have perished on that day, but considered on the day of its pawning if the object was not observed between the time of its pawning and the time he claimed that it was affected.



debt, and if the value of the pawned property was larger, the debtor may seek compensation from the creditor for the excess of that value over the underlying debt.

### 71.7.3 Consumption of the pawned property

All jurists agreed that the pawned property is guaranteed if consumed, and that its value would thus replace it as the object of pawning. However, they differed over the details of determining the party responsible for guaranty, and the timing of value determination:

- The Ḥanafīs ruled that if the debtor consumed or adversely affected the pawned property, then he must guarantee its value if it is non-fungible, and its equal if it is fungible.<sup>51</sup> In this regard, the value is determined on the day of transgression, and the creditor is the party against whose right of holding the debtor thus transgressed. The creditor should thus demand compensation from the debtor, and hold the compensation (in value or equal amount) until the maturity date of the underlying debt, as replacement of the object of pawning. If the debt was already matured at the time, then the creditor may take full repayment of the underlying debt from the compensation of value.

On the other hand, if the creditor consumed the pawned property, or otherwise affected it adversely through his transgression or negligence, he must guarantee its value if it is non-fungible and its equal replacement if it is fungible. In this case, the value of the pawned property is assessed on the day of its receipt, since his guaranty started on that date. This is in contrast to the case where a third party transgresses against the property, whereby he would guarantee the property's value on the day of transgression.

In all three cases where the property was affected adversely by the creditor, the debtor or a third party, the compensation in value or quantity replaces the pawned property as the object of pawning. Thus, the creditor's right would be associated with the compensation in the same manner it was associated with the pawned property. In the two cases of debtor or third party transgression, the creditor should demand compensation from the transgressor, and the compensation should be given to the initial holder of the pawned property, be it the creditor or a trustee.

- The Shāfi'īs and Ḥanbalīs ruled that the transgressor against pawned property must guarantee its value or its equal in quantity, as determined on the day of transgression.<sup>52</sup> Thus, the compensation would take the place of the initially pawned property as the object of pawning, whether

<sup>51</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.163), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.87), <sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.60).

<sup>52</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.136,138), 'Ibn Qudāmah (, vol.4, p.396), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.328).



or not that compensation is received. Thus, the creditor would continue to have priority over other creditors of the pawning debtor for the amount of compensation, to be paid out of the transgressor's estate if necessary. In this regard, they ruled that the pawning debtor, as owner of the pawned property, is the one to demand payment of its compensation, but the actual compensation should be received by the party that held the property in pawning, i.e. the creditor or trustee.

- The Mālikīs ruled that if the pawned property is transgressed upon by the debtor or a third party, then either the debtor compensates the creditor by pawning an identical property, or the compensation must be calculated according to the perished property's value on the day of the transgression that caused it to be guaranteed.<sup>53</sup> On the other hand, if the creditor is the transgressor against the pawned property, then some Mālikīs ruled that compensation should take into account the value at the time of pawning, and others ruled that the value should be calculated as of the date of its perishing.

## 71.8 Selling pawned property

Our discussion of the sale of pawned property will cover five subtopics: (A) right of voluntary or compelled sales of pawned property, (B) sales of perishable pawned property, (C) priority for the creditor with whom the property was pawned over other creditors, (D) stipulating a condition that the creditor will own the pawned property if the underlying debt is not paid, and (E) rulings regarding claims of the property's original owner after it is sold.

### 71.8.1 Right to sell

#### Voluntary sales

Jurists are in agreement that a pawned property continues to be owned by the debtor after its delivery to the creditor, as per the above listed Ḥadīth. Thus, only the debtor has the right to sell the property. However, the non-Shāfi'īs highlight the attachment of the creditor's right of withholding the pawned property from the debtor, as well as the creditor's first claim to the financial value of the pawned property. Consequently, the Ḥanafīs and Mālikīs consider the debtor's sale of pawned property to be suspended pending the creditor's permission as long as the latter's rights of withholding are valid. Then, once the creditor's rights are dropped (e.g. if the underlying debt is repaid), the debtor's sale would be executable once concluded.

Thus, jurists agree that the debtor is allowed to sell the pawned property with the creditor's permission. If the debtor dies with his property pawned in lieu of his debts, then his plenipotentiary or heir becomes entitled to selling

<sup>53</sup> Al-Dardīr ((Mālikī)A, vol.3, pp.244,253).



the property with the creditor's permission. Moreover, the authorized debtor is allowed during his life to appoint a selling agent, whether that agent is the creditor, the trustee, or a third party.

- The Ḥanafīs mentioned some differences between agencies that are stipulated in the pawning contract itself, and those that are established after the contract's conclusion.<sup>54</sup> Among those differences, they mentioned that if the agency was stipulated as a condition in the pawning contract, then the agent cannot be fired by his principal, and he is not automatically fired upon the death of the debtor or the creditor. Moreover, such agencies cannot be made more restrictive after the fact, and the agent may be forced to sell the pawned property if he refuses to act according to his agency. All those rulings follow from the fact that the agency in this case was one of the conditions of the pawning contract, and thus it becomes binding in accordance with the bindingness of that contract. In contrast, a selling agency that is established after the conclusion of pawning may be terminated by firing, the death of the debtor or creditor, etc. In the latter case, the agency was never considered a characteristic of the pawning, and thus the creditor's rights were not associated with it.
- The Mālikīs explained some of the details pertaining to the debtor's permission to sell his property.<sup>55</sup> Thus, they ruled that the creditor or the trustee is not permitted to sell the pawned property without the debtor's permission. This ruling follows from the fact that the debtor is the only one who is primarily entitled to sell his property. Then, if the debtor gives the creditor or the trustee his permission to sell the pawned property, they considered the cases where the permission was conditional or unconditional:
  - If the permission to sell was tied to a condition of not repaying the debt before a certain time, then the authorized party may not sell it before that time, unless a judge rules that the debt is due for repayment.
  - If a trustee is given an unconditional permission to sell the pawned property, then he may proceed to sell it without seeking a judge's ruling.
  - If the creditor is given an unconditional permission to sell the pawned property, then he may proceed without a judge's ruling if the permission was issued after the contract. However, if the unconditional permission was given at the inception of the contract, then he must check with a judge to avoid suspicion that he forced the debtor to issue that permission.

In all cases, the sale is deemed executed if it contains no injustice in the price. However, if the item is sold for less than its value, then the debtor

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<sup>54</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.81 onwards).

<sup>55</sup> Al-Dardīr ((Mālikī)A, vol.3, p.250 onwards).



is permitted to take it back from the buyer at the same price at which he obtained it, even if the object is sold many times in the meantime.

The Mālikīs agreed with the Ḥanafīs that the debtor and creditor are not authorized unilaterally to fire the agent for selling the pawned property, and he may not relieve himself from his agency. Thus, the agent may only be relieved of his agency if the debtor and creditor fire him jointly.

- The Shāfiʿīs and Ḥanbalīs agreed with the ruling that the debtor is the only one entitled to sell his property, but then only with the creditor's permission.<sup>56</sup> Thus, the debtor and his agent are not permitted to sell the pawned property without the creditor's permission, unless the latter refuses to give his permission thus. In this case, the debtor may appeal to the judge, who would give him an option to give his permission that the property be sold, or to absolve the debtor of his debt. This would ensure that the creditor's rights are protected. Then, if the creditor refuses to do either, the judge may give his permission to the debtor to sell the property in order to repay his debt.

### Obligatory sale

We have seen that pawning is essentially an insurance of debt repayment, whereby if the debtor does not pay his debt at maturity, the pawned property may be sold and its price may be used to repay the underlying debt. Under normal circumstances, the pawned property would be sold by the debtor or his agent, since the debtor continues to be its owner. Thus, upon maturity of the underlying debt, if the creditor demands repayment of the debt and the debtor repays, then fine. Otherwise, if the debtor does not repay voluntarily, or due to financial difficulties or being away, then all jurists agree that the judge may force him to repay his debt.

In this regard, the Ḥanafīs and Mālikīs ruled that the judge may force the debtor's agent to sell the property, while the Shāfiʿīs and Ḥanbalīs did not allow him to do so. The latter two schools ruled that the agent cannot be forced to sell, since agency is a voluntary and non-binding contract. Thus, they ruled that if the debtor is absent or refusing to repay his debt, the judge may sell the pawned property himself.

Procedurally, the judge must first order the debtor to sell the pawned property, then if he refuses, the Mālikīs, Shāfiʿīs, Ḥanbalīs, 'Abū Yūsuf, and Muḥammad ruled that the judge may sell the property. Thus, they ruled that there is no need to use various penalties and coercion to force the debtor to sell the pawned property.<sup>57</sup> In contrast, 'Abū Ḥanīfa ruled that the judge is not permitted to sell the pawned property without the debtor's consent, but ruled that he should

<sup>56</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.130), 'Ibn Qudāmah (, vol.4, p.362).

<sup>57</sup> Al-Dardīr ((Mālikī)A, vol.3, p.251), 'Ibn Juzayy ((Mālikī), p.324), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.134), 'Ibn Qudāmah (, vol.1, p.307), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.330).



coerce him until he sells it himself.<sup>58</sup>

In this regard, if the debtor has property of the same genus as the underlying debt, then the debt may be repaid from that property without necessarily forcing him to sell it. On the other hand, if it is necessary to sell the pawned property to repay the debt, then the debtor must bear all expenses of the sale, since he is the owner of that property, and he is the one responsible for repaying his debt.

### 71.8.2 Selling perishable pawned property

We have previously seen that perishable goods may be pawned. In that context, if the perishable pawned goods were fruits that can be dried and stored, then they should be dried at the debtor's expense, with or without his permission. This follows from the fact that the debtor is responsible for all upkeeping expenses, which include the cost of drying in this case.

On the other hand, if the perishable pawned goods cannot be dried for storage, then the creditor is permitted to sell it immediately, since its sale is the only way to protect its financial value. However, the sale in the latter case must be authorized by a judge, since the creditor is thus selling the property of another. Thus, if the creditor sells the goods without having the debtor's or the judge permission, then he must guarantee the goods.

Then if the goods are sold and the underlying debt is matured, the debt is immediately repaid from the price. If the debt is not yet matured when the goods are sold, then the price becomes an object of pawning until the maturity date.

In this regard, even if it is known that the debt will mature before the pawned goods perish, the perishable property may still be sold, and the price replaces it as the object of pawning. This ruling applies whether or not selling the pawned property was stipulated as a condition of the pawning.<sup>59</sup>

In contrast, the Shāfi'is argued in the last case that if the pawned property was known only to perish after the debt is matured, then the ruling must depend on whether or not its sale was stipulated as a condition of the pawning. If it was stipulated thus, then the pawning is valid, and the condition must be satisfied by selling the property and making its price the object of pawning. However, if the sale was not stipulated as a condition of pawning, then the majority of Shāfi'is ruled that the pawning is valid, and the property should not be sold prior to maturity of the debt. Thus, the pawning would remain the same according to this decision, and if the property were to perish, then it would not longer play the role of insurance of debt repayment.<sup>60</sup>

<sup>58</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.148), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.357,359), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.222).

<sup>59</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.148), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.157), 'Ibn Qudāmah (, vol.4, p.341), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.308), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.123 onwards).

<sup>60</sup>The minority opinion of the Shāfi'is, which is the opinion of the majority of Hanbalīs, is that the pawning is valid, and the pawned property may be sold when it is about to perish. The latter was based on conventional practice, and the fact that the pawning debtor certainly did not intend to waste his property. Thus, since the only way to protect the property in this



### 71.8.3 Priority claims of the creditor

All jurists with the exception of the Zāhirīs ruled that the creditor has a priority claim to the price of property pawned with him over other creditors of the debtor, whether the debtor is dead or alive.<sup>61</sup> This ruling is derived from the attachment of the creditor's rights to the pawned property, and the establishment of pawning as a form of insurance of repayment of its underlying debt. Further proofs are provided by the unanimous ruling that the debtor is not allowed to deal in the pawned property without the creditor's permission, and the non-Shāfi'ī ruling that the creditor has a right to withhold the property from the pawning debtor.

Thus, if the debtor's property is insufficient to repay all his debts, or if his estate is put under legal control (*ḥajr*, which is allowed for all jurists with the exception of 'Abū Ḥanīfa) due to declaring bankruptcy, then the creditor is the first to collect his rights from the price or value of the pawned property. Similarly, if the pawned property was guaranteed by any transgressor party, the creditor would have a first claim to the compensation in value or kind.

In this regard, other creditors must act as residual claimants for any increase of the price over the underlying debt of the pawning. Those other creditors cannot complain, since the pawned property is tied to that particular creditor's right and the debtor's liability. Thus, the creditor in the pawning has precedence over other creditors by having a right to the specific pawned property as well as the debtor's liability, while the other creditors only have a right established as a debtor liability.

If the price of the pawned property exceeds its underlying debt, then the primary creditor is repaid in full, and the excess over the debt is distributed equally to all other creditors. On the other hand, if the pawned property's price was smaller than the underlying debt, then the primary creditor would collect all of the price, and compete with the other creditors for the rest of the debt.

In this regard, the underlying debt is repaid from the price if it has matured. However, if the debt is not yet matured, and the pawned property was sold for some reason (e.g. to prevent it from perishing), then the price is established as the object of pawning in place of the sold property, until the debt matures.

### 71.8.4 Transfer of ownership to the creditor

Jurists have agreed that if the creditor stipulates a condition that the pawned property becomes his (or is thus sold to him) if the debt matures but is not paid, then that condition is deemed defective based on the explicit Ḥadīth that forbids this transaction.<sup>62</sup> Thus, 'Imām Mālik said: "The meaning of the Ḥadīth, and

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case is by selling it, it is implicitly understood that this is what the contract implies. This was deemed by Al-Rāfi'ī in *Al-Sharḥ Al-Ṣaghīr* as the majority opinion, and Al-'Isnawī ruled accordingly.

<sup>61</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.153), 'Ibn Juzayy ((Mālikī), p.324), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.134), 'Ibn Qudāmah (, vol.4, p.404 onwards).

<sup>62</sup> 'Ibn Qudāmah (, vol.4, p.383), 'Ibn Juzayy ((Mālikī), p.324 onwards), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.5, p.239), Al-Shawkānī (, vol.4, p.235 onwards), Al-Khaṭīb



Allāh knows best, is that the debtor should not be barred from releasing his pawned property, and the prohibition in the Ḥadīth implies that the forbidden practice is defective". Al-'Azhariy agreed with Mālik's interpretation of the Ḥadīth, and so did 'Abdul-Razzāq ibn Mu'ammār.

Thus, the Ḥadīth means that the creditor does not become the owner of the pawned property if it is not released from pawning at the date of maturity of the underlying debt. Then, if the pawned property perishes, the creditor's right remains intact, and the debtor bears the loss, since he is entitled to the output of the pawned property and responsible for its expenses.

In this regard, Al-Nawawī and commentators on *Al-Minhāh* ruled that if it is stipulated in the pawning that the pawned property is considered sold to the creditor when the underlying debt matures, then the pawning contract is rendered defective by its timing, and the sales contract is rendered defective by its forwarding. He thus ruled that the pawned property is considered a trust prior to maturity of the underlying debt, by virtue of the defective pawning receipt, and then becomes guaranteed after maturity, by virtue of the defective sale.

In contrast, the Ḥanbalī jurist 'Abū Al-Khaṭṭāb, and some Ḥanafī jurists, ruled that pawning is not rendered defective by this condition. Rather they interpreted the Ḥadīth to say that the transfer of ownership to the creditor is negated, but the pawning itself remains valid. Moreover, they argued, if the debtor accepted the pawning with that condition, he clearly would accept it without the condition.

However, the Ḥanbalī 'Ibn Qudāmāh supported the earlier opinion by arguing that if the pawning is established with a defective condition, it is itself rendered defective, in analogy to the case of stipulating a time period for the pawning. In this regard, he argued that the Ḥadīth does not mention whether or not the condition is stipulated at the inception of the contract, and thus cannot be used as a proof against the contract's defectiveness.

### 71.8.5 Third party entitlement after sale

The Ḥanafīs ruled that if a pawned property is sold, and then discovered to belong to a party other than the pawning debtor, then we need to consider two cases:<sup>63</sup>

- If the pawned property was intact when the real owner finds out, then he is entitled to take it if he wishes, since it is his property and he has no liabilities that prevent him from regaining its possession. In this case, the buyer has the option of seeking compensation for the price from the seller, or seeking compensation from the creditor if he received the price. In this case, the realization that the property belonged to another party negated the sale, and hence whatever the buyer paid is no longer viewed

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Al-Shirbīnī ((Shāfi'ī), vol.2, p.137).

<sup>63</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.223), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.359 onwards).



as a price. Thus, since the creditor gained possession of the price as such, he must thus give it back, and its receipt must be legally nullified.

In this regard, if the seller is a holding trustee, then he may demand compensation for the price from the pawning debtor after the price is returned to the buyer. This follows from the fact that the trustee is considered the debtor's selling agent, and deserves compensation for whatever he paid to the creditor.

- If the pawned property had already perished, then its owner may demand compensation from the debtor (who thus usurped his property and pawned it), demand compensation from the trustee (who thus transgressed by selling and delivering his property), or demand compensation from the buyer (since his property perished in his possession). Then, if he seeks and receives compensation from the pawning debtor, the sale and debt repayment would be considered valid, since the pawning debtor becomes retroactively the owner of the property by paying compensation to its true owner. Thus, he would have pawned his own property, and sold his own property, rendering those transactions valid.

The sale is also executed if the true owner seeks compensation from the seller-trustee, since the trustee would be retroactively considered the owner of the property by paying the compensation to the true owner. Thus, the trustee would have sold his own property. Then, the trustee may in turn seek compensation either from the pawning debtor, for whom he acted as an agent, in which case the sale and the debt repayment are deemed executed. On the other hand, the trustee may seek compensation from the creditor for the price (not the value) of the pawned property, by virtue of having collected an illegal price. The price is illegal for the creditor since the trustee is now considered the owner of the property, and hence he is the one entitled to the price and not the creditor. Thus, the creditor only received the price because the trustee thought that the property belonged to the debtor rather than belonging to himself, and that understanding was later negated. Then, once the trustee seeks compensation from the creditor, repayment of the underlying debt is negated, and the creditor may once more demand repayment of the underlying debt from the debtor.

Finally, if the true owner seeks compensation from the buyer of the pawned property, then the buyer may seek compensation from the trustee, since he sold him that property. The trustee may then, in turn, seek compensation from the debtor, since he has the ultimate liability. In this case, if the price was already delivered to the creditor, the debt repayment is valid.

## 71.9 Delivery of pawned property

We have seen that the non-Shāfi'is recognize a permanent right for the creditor to withhold the pawned property until the underlying debt is repaid. This



withholding is understood to give an incentive to the debtor to repay his debt so that he may regain possession of his pawned property, and extract usufruct thereof. In addition, they recognize the creditor's right to demand repayment of the underlying debt when it matures, while continuing to hold the pawned property.<sup>64</sup>

Then, if the underlying debt is terminated, or if the pawning is terminated, the creditor must deliver the pawned property to its owner. In this regard, the underlying debt may be terminated in one of many ways, including absolution from the debt, receiving it as a gift, repaying it, using it as a price when buying another property from the debtor, or transferring it to a third party.

### Debt termination

Thus, if the creditor continues to hold the pawned property after the debt or the pawning is terminated, the Shāfi'īs and Ḥanbalīs ruled that he would thus hold it as a deposit.<sup>65</sup> In contrast, 'Abū Ḥanīfa ruled that the creditor would be holding the pawned property thus as a deposit if the debt was terminated by absolution or gift. On the other hand, he ruled by juristic approbation that if the debt was terminated through repayment, being used as a price in buying another property from the debtor, or transfer to a third party, then the creditor's possession continues to be a possession of guaranty. Thus, if the pawned property were to perish after the debt is terminated in one of the latter ways, it would be cancelled against the smaller of its value and the underlying debt. 'Abū Ḥanīfa thus differentiated between those two cases based on the fact that absolution and gifts would terminate the debt irrevocably, thus eliminating the need for guaranteeing the pawned property. In contrast, repayment does not drop the debt, but rather establishes an equal debt on the creditor which thus prevents him from demanding repayment any longer, and the two debts mutually cancel each other (in a *muqāṣṣah*). In this regard, if the debt remains established as a liability on the debtor, the resulting guaranty of the pawned property must also remain.<sup>66</sup>

The Mālikīs distinguished in this context between the cases of pawned properties that can be hidden (e.g. jewelry or sailing ships) and those that are easily observable.<sup>67</sup> In the first case, they ruled that the creditor must return the pawned property to the debtor as soon as the underlying debt is terminated, otherwise he must continue to guarantee it. They based this ruling on the view that the pawned property after repayment of the underlying debt cannot be considered analogous to deposits, since deposits are meant to benefit the depositor alone, while pawning benefits both parties. On the other hand, if the creditor is willing to deliver the pawned property to the debtor, but the latter requests that the creditor keep it, then it becomes a trust.

<sup>64</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.198).

<sup>65</sup>Ibn Qudāmah (, p.397), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.136).

<sup>66</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.243), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.96).

<sup>67</sup>Al-Dardīr ((Mālikī)A, vol.3, p.253), 'Ibn Juzayy ((Mālikī), p.324).



### Pawning termination

The pawning may be terminated in a number of ways, including absolution, gifts, repayment of the underlying debt, or voiding of the pawning prior to the termination or dropping of the underlying debt. Moreover, a pawning may be terminated if it is discovered that there was in fact no underlying debt at its inception.

- Once the pawning is terminated, then all jurists agree that the pawning will have no further consequences if the creditor returns the pawned property to the debtor.
- However, if the pawned property remains in the creditor's possession after the pawning is terminated, then the Shāfi'is and Ḥanbalīs ruled that it would be held as a trust, regardless of how the pawning was terminated (i.e. regardless of whether or not the underlying debt continues to exist, and whether or not there was an underlying debt at the inception).
- The Mālikīs ruled that the pawned property would be held in a possession of trust if the debtor and creditor agree that there was no underlying debt at the inception of the pawning.
- The Ḥanafīs ruled that if the debtor and creditor agree that there was no debt at the inception of the pawning, but only after the pawned property had perished, then the creditor's guaranty of the property must remain intact.<sup>68</sup> On the other hand, the Ḥanafīs differed in opinion for the case where the debtor and creditor agree thus while the property is still intact, and then the property perishes. In the latter case, some ruled that the pawning is voided, and the pawned property is considered to be held by the creditor in a possession of trust, while others ruled that the creditor's guaranty remains as long as the property is in his possession. Of the two opinions, the first one seems more valid.

We have already discussed under "debt termination" the various opinions in cases where the pawning is terminated through means other than mutual agreement that the underlying debt did not exist at the inception of the pawning.

### Delivery timing

The debtor must repay his debt first, and then the creditor must deliver the pawned property to him, in analogy to the case of sales where the price must be delivered first and then the object of sale. This ruling follows from the fact that the creditor's right is satisfied through repayment of the debt, and the pawning debtor's right is satisfied through delivery of his pawned property, thus requiring the above mentioned sequencing to ensure equity between the two parties.<sup>69</sup>

<sup>68</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, p.373 onwards).

<sup>69</sup>Ibn Al-Humām ((Ḥanafī), vol.8, pp.198,200).



Thus, if the pawning debtor repays part of the debt, all four Sunnī schools of jurisprudence agree that the entire pawned property would remain in pawning.<sup>70</sup> This ruling follows from the fact that the entire pawned property is considered to be held by the creditor as insurance for the repayment of the underlying debt. In this regard, the right to hold that property is not divisible, and is in fact attached to every part of the debt. Hence, no part of the pawned property is released from pawning until the entire debt is repaid, regardless of whether or not the pawned property is physically divisible.

### Delivery location

The Ḥanafīs differentiated in this regard between pawned properties that are costly and cumbersome to transport, and those that are not:<sup>71</sup>

- Thus, if the pawned property is costly and cumbersome to transport, and he asked the debtor to repay him in a city other than the location of the pawning, the debt should be repaid thus, but the creditor is not responsible to bring the pawned property to that location. In this case, the creditor is only required to facilitate legal delivery of the pawned property in the sense of giving the pawning debtor full access to it. This ruling follows from the fact that transporting the pawned property in this case is costly and cumbersome for the creditor, and the pawning contract does not require him to endure such hardship.
- If the pawned property was virtually costless to transport, then the creditor is required to bring it to the debt repayment location. This ruling follows from the fact that all locations are considered the same for easily transportable properties with regards to the rights of receipt and delivery. Thus, the location of repayment is irrelevant in pawning such transportable properties, in analogy to the ruling for *salam* contracts.
- In addition, the classical ruling if the debt is repaid in the same city as the pawning is that the creditor must deliver the pawned property, whether or not it is costly to do so.

However, 'Ibn 'Abidīn noted that this last ruling is debatable, since the creditor is in fact required only to give the debtor access to his property, and not necessarily required to transport it. In fact, he added, that classical opinion is in contradiction with the statement in *Al-Bazzāziyyah*: “If transportation of the pawned property is costless and effortless, then the creditor must bring it, otherwise if it is costly and cumbersome to do so (e.g. if it must be transported to another location), then he is not required to bring it”.

<sup>70</sup>'Ibn 'Abidīn ((Ḥanafī), vol.5, p.354), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.63 onwards), Al-Kāsānī ((Ḥanafī), vol.6, p.153), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.200), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.272), 'Ibn Juzayy ((Mālikī), p.324), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.141), 'Ibn Qudāmah (, vol.4, p.361).

<sup>71</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.198), 'Ibn 'Abidīn ((Ḥanafī), vol.5, p.343 onwards).



### 71.9.1 Rulings for defective pawning

We have seen previously that the most important ruling for valid pawning is the association of the pawned property with the right of the named creditor in the pawning contract, to the exclusion of other creditors of the named debtor. The Ḥanafīs also add the important rulings that the creditor thus has the right to withhold the property from the debtor, and the responsibility to guarantee it.

On the other hand, jurists of the four schools agreed that invalid and defective pawning has no legal status if the pawned property continues to exist. In particular, the creditor would not have the right to withhold the property from the debtor, who may thus recall it. If the creditor were to prevent the debtor from recalling his property in this case, he would be considered a usurper who thus guarantees the property with its equivalent if it is fungible, or its value if it is non-fungible.

On the other hand, jurists differed in their rulings regarding the object of a non-valid pawning if it had perished:

- The Ḥanafīs ruled in this case (e.g. in pawning an unidentified part of a property) that the property would perish as a pawned property.<sup>72</sup> In other words, they ruled that it would cancel against the smaller of its value and the underlying debt. This is the more correct Ḥanafī opinion.

However, Al-Karkhī ruled that the property would thus perish in a possession of trust. He based his ruling on the fact that the pawning was not valid, and hence the creditor's possession was a possession of trust in analogy to deposits, since he received the property with its owner's consent.

The Ḥanafīs also ruled that the creditor has priority over other creditors for repayment of his debt from the pawned property if the debtor dies, whether the pawning is valid or defective.

- The Mālikīs generally agreed with the Ḥanafīs in this case. Thus, they ruled that prior to repayment of the underlying debt, the creditor in a defective pawning has priority over other creditors to extract repayment from the pawned property.<sup>73</sup> Moreover, they ruled that the status of pawned property that perishes in the creditor's possession is the same whether the pawning is valid or defective. Finally, they ruled that this priority right establishes the creditor's right to withhold the object of a defective pawning. However, that right does not imply that he has the right to demand receipt of that object of a defective pawning from the debtor.

- the Shāfi'īs and Ḥanbalīs ruled generally that valid and defective contracts

<sup>72</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.163), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.365,374).

<sup>73</sup> Al-Dardīr ((Mālikī)A, vol.3, pp.237,241,247).



have the same rulings with regards to guaranty.<sup>74</sup> In this regard, they argued that if a valid contract (e.g. a sale or a simple loan) requires guaranty after delivery, then the guaranty must also be required in the defective counterpart of that contract. For instance, the received object of a sale is guaranteed, whether or not the sale is valid. On the other hand, if the valid version of a contract (e.g. pawning, gift, or lease) does not require guaranty, then the defective version does not require it either. In those cases, the holder of a property would be holding it in lieu of its owner, and thus those contracts do not impose guaranty on the holder. Consequently, they ruled that the creditor does not guarantee pawned property in his possession against perishing, whether the pawning is valid or defective (e.g. if the pawned property is forbidden, unknown, non-existent, non-deliverable, or unidentified).

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<sup>74</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.137), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.329), 'Ibn Qudāmah (, vol.4, pp.381,385).



## Chapter 72

# Growth of pawned property

While jurists agree that any increase or output of a pawned property belongs to the pawning debtor, they vary in the degree to which they include growth and output of a pawned property in the pawning:

- The Ḥanafīs ruled that all contiguous increases in the pawned property (e.g. fruits, wool, milk) and all separate growth thereof (e.g. offspring) are considered part of the pawning.<sup>1</sup> They based this ruling on the view that both types of growth are derivative of the originally pawned property, and the creditor's right to the pawned property is binding, and thus that right extends to the derivative increases in the pawned property.

On the other hand, the Ḥanafīs, Mālikīs, and Shāfi'īs ruled that separate non-derivative growth (e.g. rental payments for real estate or land) belong exclusively to the debtor, and do not become part of the pawning. Thus, the underlying debt is not associated with such increases, since they result from a contractual agreement between the owner of the pawned property and another party, and thus are not derivative of the property itself. Thus, the owner alone is entitled to this output or growth in accordance with the contract.

- The Mālikīs ruled that all contiguous and non-separable growth in the pawned property (e.g. fat), as well as all non-contiguous offspring or product of the property (e.g. offspring, palm shoots), are considered part of the pawning. Growing wool on the backs of sheep is also considered part of the pawning if it existed on the back of the sheep at the inception of the contract.<sup>2</sup>

On the other hand, they ruled that any increases that are not part of the same form as pawned property are not considered part of the pawning,

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<sup>1</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.240), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.365,370), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.94), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.62), Al-Kāsānī ((Ḥanafī), vol.6, p.152).

<sup>2</sup>Al-Dardīr ((Mālikī)A, vol.3, p.244), 'Ibn Juzayy ((Mālikī), p.324), 'Ibn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, p.272).



whether they are derivative of the pawned property (e.g. fruits of trees, milk) or not (e.g. rental payments).

- The Shāfiʿīs ruled that contiguous growth such as fat, increase in size, or growth of fruits, is considered part of the pawning. They based this ruling on the view that such growth belongs to the pawned property and cannot be identified in isolation.<sup>3</sup> On the other hand, they ruled that any separate or separately identifiable growth (e.g. offspring, wool, hair, milk, eggs, and rental payments) are not considered part of the pawning. They based this ruling on the above mentioned Ḥadīth of 'Abū Hurayrah: "A pawned property does not become property of the creditor if the debt is not paid at maturity; and the debtor remains its owner who is thus entitled to its output and responsible for its expenses". In this regard, the types of growth listed here are part of the output of the pawned property, to which the owner is entitled. Thus, since pawning does not transfer ownership of the property or its usufruct, separate growth of the property belongs to the original owner, in contrast to the ruling for lease contracts.
- The Ḥanbalīs ruled that all types of increase in pawned property is considered a part of the pawning in the possession of the creditor or his agent. Thus, if and when the pawned property is sold to repay the underlying debt, all such increases, contiguous or not, are to be sold with it.<sup>4</sup> They based this ruling on the view that the pawned property was tied to the underlying debt through the pawning contract, and thus any increase in the pawned property is also tied to that debt, in analogy to the ruling for sales. In this regard, contiguous and separate growth are treated the same way since they are both derivative of the pawned property, and hence the legal status of the latter is extended to the growth.

In summary, the Ḥanbalī school is the most general in including all growth and output of the pawned property in the pawning. The second most general school is that of the Ḥanafīs, who include all derivative growth, contiguous and separate, in the pawning. Third come the Mālikīs who only include in the pawning separate growth that cannot be classified as output (e.g. offspring, palm tree shoots, and wool that had been growing since the inception of pawning), and exclude separate output that can be viewed as rental payment or product of land. The most restrictive of the four schools is that of the Shāfiʿīs, who only include in pawning qualitative increases, and exclude any separately identified growth.

## 72.1 Adding to the pawning or the debt

Most jurists allow the debtor to add a second property to that already pawned in lieu of his debt, so that both properties would jointly be pawned in lieu of

<sup>3</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.139), 'Abū-'Ishāq Al-Shirāzī ((Shāfiʿī), vol.1, p.310 onwards).

<sup>4</sup>Ibn Qudāmah (, p.388 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.326).



that debt. This ruling was based on the view that such an addition to the pawned property can only increase the insurance of debt repayment, which is the essential objective of a pawning contract.

In contrast, Zufar ruled that such addition to the pawned property is not allowed, since it leads to lack of identification of the pawned properties' shares in the debt. Thus he reasoned that the second pawned property must be associated with a portion of the debt, and that portion must thus be released from the first pawning. But that portion of the debt is by necessity unidentified, and such lack of identification renders the pawning defective in his view. However, this argument was refuted by asserting that lack of identification of portions of the debt does not alter the validity of the pawning. In other words, the underlying debt may be divided between the original pawned property and the newly pawned one in proportion to their values on the day of receipt.

On the other hand, there are two different opinions regarding adding a second debt to the pawning, rendering the received property to be pawned in lieu of both debts:

- 'Abū Ḥanīfa, Muḥammad, the Ḥanbalīs, and in one of two opinions, Al-Shāfi'ī ruled that this practice is not permissible. This ruling is based on the view that adding a second debt to the pawning is tantamount to effecting a second pawning, i.e. pawning an already pawned property, which is not permitted since the first debt was associated with the entire pawned property.
- 'Imām Mālik, 'Abū Yūsuf, 'Abū Thawr, Al-Muznī, and 'Ibn Al-Mundhir ruled that adding a second debt to the pawning is permissible, based on the permissibility of adding a second pawned property to the pawning. In this regard, they ruled that adding the second debt is tantamount to voiding the first pawning, and establishing a new pawning with the property being pawned in lieu of the combined debt. This dissolution of the first pawning and subsequent establishment of a new one is permissible for all jurists.<sup>5</sup>

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<sup>5</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.241), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.372), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6,p.95), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.62), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.309), 'Ibn Qudāmah (, vol.4, p.347 onwards).



## Chapter 73

# Pawning Contract Termination

A pawning contract may be terminated in many ways (e.g. absolution, debt repayment, gift, etc.). In what follows, we enumerate the means by which a pawning contract may be terminated.

1. Non-Shāfiʿī jurists ruled that the pawning is terminated if the creditor returns the pawned property to the debtor. They based this ruling on the view that pawning is a form of insurance of debt repayment, which insurance does not exist if the pawned property is returned to the debtor's possession. Thus, the pawning would be deemed terminated in this case. Similarly, the non-Shāfiʿīs ruled that if the debtor lends the pawned property to the creditor, or to a third party, the pawning is thus terminated.
2. If the underlying debt is fully repaid, the pawning is terminated.
3. If the judge forces the debtor to sell the property, or sells it if the debtor refuses to, then the creditor should be repaid from the pawned property's price, and the pawning is thus dissolved.

In contrast, jurists differ over the case of voluntary sale of the pawned property.

- The Ḥanafīs ruled that if the debtor sells the pawned property with the creditor's permission, then the creditor's right is attached to the property's price if the debt had matured. If the property is sold prior to maturity of the underlying debt, then 'Abū Ḥanīfa and Muḥammad ruled that the creditor's right is also attached to the price in this case, whereby the price becomes the object of pawning. They based this ruling on the view that the debtor thus sold the property with the creditor's permission, and hence the latter's right must be associated with the price, in analogy to the case where the debt is matured.



- The Mālikīs, Shāfiʿīs, and Ḥanbalīs ruled in the latter case that the pawning is invalidated if the pawned property is sold with the creditor's permission. In this case, they ruled that the debtor is not indebted for the price he receives from the sale, but the underlying debt remains intact without a pawning to ensure its repayment.<sup>1</sup>
4. If the debtor is absolved of the underlying debt in any way, including the transfer of his liability to another creditor, the pawning is terminated. Also, if the creditor takes some property (other than the pawned property) as repayment of his debt, then the pawned property is thus released of the pawning.<sup>2</sup>
  5. The creditor may void the pawning unilaterally, even if the debtor disapproves of its voiding. This ruling follows since the right associated with the pawning belongs to the creditor, and the contract is permissible for him but not binding on him. In contrast, the debtor is bound by the pawning, and thus may not void it unilaterally.<sup>3</sup>

In this regard, the Ḥanafīs ruled that the pawning is voided by the creditor after he returns the property to the debtor. They based this ruling on the view that pawning only becomes binding through receipt, and hence its voiding also requires receipt, which is accomplished by returning the pawned property to the debtor.

The Mālikīs ruled that if the creditor leaves the pawned property in the debtor's possession, until the latter sold it, then the pawning is invalidated. They based this ruling on the view that leaving the property with him for such a long time is tantamount to giving him control over the property, which is the essence of voiding the pawning contract.<sup>4</sup> Similarly, they ruled that the pawning is terminated if the debtor sold the pawned property with the creditor's permission after the latter had received it, in which case the debt will remain intact, but would not be insured by a pawning.

6. The Mālikīs also ruled that the pawning is invalidated if the pawned property was not yet received, and the debtor dies, is declared bankrupt, comes under the demands of other creditors to repay their debts, or falls into terminal insanity or illness.<sup>5</sup> This ruling follows from their view that pawning becomes binding following its conclusion through offer and acceptance.

In this regard, the Ḥanafīs ruled that a pawning is invalidated if either the debtor or the creditor were to die prior to receipt. They also ruled that the contract is voided if the debtor declares bankruptcy.

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<sup>1</sup>Ibn Qudāmah (, vol.4, p.403), Al-Dardīr ((Mālikī)A, vol.3, p.242).

<sup>2</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.141).

<sup>3</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.141).

<sup>4</sup>Al-Dardīr ((Mālikī)A, vol.3, p.242 onwards).

<sup>5</sup>Al-Dardīr ((Mālikī)A, vol.3, p.241 onwards).



In contrast, the Shāfi'is and Ḥanbalis ruled that the pawning is not invalidated if either the debtor or the creditor dies before delivery, nor is it invalidated if either party becomes insane or the debtor declares bankruptcy.

On the other hand, all jurists agree that death of either party or the declaration of debtor bankruptcy does not void the pawning if such events occur after the pawned property was delivered to the creditor.

7. Jurists agree that the pawning contract is terminated if the pawned property perishes, since the object of the contract would thus cease to exist. This ruling is adopted both by the non-Ḥanafis who consider the creditor's possession of the pawned property to be a possession of trust (guaranteed only against transgression and negligence) and the Ḥanafis who ruled that the financial value of the pawned property is guaranteed for the lesser of its total value and the underlying loan.
8. The pawning is terminated if either the debtor or the creditor rents the property, gives it as a gift, or sells it to a third party, with the permission of the other. Moreover, the pawning is terminated if the debtor leases the property to the creditor, and a new receipt takes place for the lease.

On the other hand, if the creditor sells the property to the debtor does not terminate the pawning, since the price takes the place of the sold pawned property as the object of pawning, as we have seen in the chapter on dealing in pawned property.<sup>6</sup>

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<sup>6</sup>Ṭbn ʿĀbidīn ((Ḥanafī), vol.5, p.364).



## Chapter 74

# Debtor-Creditor Disputes

In this chapter, we shall discuss the role of a judge or other arbitrator or authority in determining the standards of evidence if the debtor and creditor have a dispute regarding the pawned property and the underlying debt.

### 74.1 Disputes over the underlying debt

The Ḥanafīs, Shāfiʿīs, and Ḥanbalīs ruled that if the debtor claims that the underlying debt is smaller than what the creditor claims it to be, then the debtor's claim is accepted if supported by his oath. This ruling follows from the view that the creditor is thus claiming an increase in the amount of the underlying debt, and the debtor is denying it. As we know, the denier's claim is thus accepted if supported by his oath, following the Ḥadīth: "If people's claims were accepted, there would be many groundless claims for the lives and properties of people; that's why the denier's claim is accepted if he backs it with his oath".<sup>1</sup>

In contrast, the Mālikīs ruled that the creditor's claim is accepted up to the value of the pawned property, and the debtor's claim is accepted for the rest. Despite the creditor being a claimant, they argued that the creditor has a case if the pawned property's value was larger than the underlying debt claimed by the debtor. In this regard, they refer to the theoretical rule of 'Imām Mālik that the party whose claim is accepted based on his oath is the party with the stronger case. On the other hand, the non-Mālikīs did not find the argument convincing, since the value of the pawned property may very well be smaller than the underlying debt.

On the other hand, all jurists agree that a dispute over what is pawned (e.g. if the debtor claims to have pawned only A and the creditor claims that he

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<sup>1</sup>Narrated by Muslim and Al-Bukhārī on the authority of 'Ibn ʿAbbas. Another narration by Al-Bayhaqī is more explicit: "If people's claims were accepted, there would be many groundless claims for the lives and properties of people; that is why the claimant needs to provide a material proof, and the denier's claim is otherwise accepted if backed by his oath", c.f. *Al-'Arbaʿīn Al-Nawawīyyah*.



pawned A and B), then the debtor is considered a denier of the creditor's claim. Hence, the debtor's claim will be accepted in this case if supported by his oath.<sup>2</sup>

## 74.2 Destruction of the pawned property

If the creditor claims that the pawned property perished, but does not mention how or why it perished, then all jurists agree that his claim is accepted if backed by his oath. This ruling follows from the view that the creditor holds the pawned property in a possession of trust.<sup>3</sup> Similarly, they ruled that the creditor's claim regarding the amount of the perished pawned property is accepted if backed by his oath, since the loss is his.<sup>4</sup>

On the other hand, they agreed that if the debtor and creditor disagree over the value of pawned property at the contract's inception, or over whether or not the pawned property in fact existed at that time, then the debtor's claim is accepted if backed by his oath.<sup>5</sup> This ruling is thus analogous to disputes over the amount of property included in the pawning.

## 74.3 Disputes over receipt

The Ḥanafīs and Shāfi'īs ruled that if the debtor and the creditor disagree over whether or not the pawned property was received by the creditor, then the debtor's claim is accepted if backed by his oath, whether the property was in fact in the debtor's or the creditor's possession. This ruling follows from the view that the default status of pawning is non-bindingness, and the non-authorization for the creditor to take possession of the property.

In contrast, the Ḥanbalīs ruled that they accept the claim of the party that actually has possession of the property. Thus, if the property was in the debtor's possession, they accept his claim since the default is non-delivery of his property to the creditor. On the other hand, if the property was in the creditor's possession, then his claim is accepted, since the default is rightful receipt. However, if they were to disagree over whether or not the debtor gave his permission to the creditor to take the property (i.e. the debtor says that he did not give his permission, while the creditor claims to have taken it with his permission), then the debtor's claim is accepted, since he is thus the denier of the creditor's claim.<sup>6</sup>

<sup>2</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.174), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.231), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2 p.274 onwards), 'Ibn Juzayy ((Mālikī), p.325), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.142), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.316 onwards), 'Ibn Qudāmah (, vol.4, p.398 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.339).

<sup>3</sup>Al-Kāsānī ((Ḥanafī), vol.6,p.154), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.275), Al-Dardīr ((Mālikī)A, vol.3, p.260), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.138), 'Ibn Qudāmah (, vol.1, p.319), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.340).

<sup>4</sup>ibid., 'Ibn Qudāmah (, vol.4, p.398), Al-Kāsānī ((Ḥanafī), vol.6, p.174).

<sup>5</sup>Al-Kāsānī ((Ḥanafī), vol.6,p.174), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.142).

<sup>6</sup>ibid., Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.321).



## 74.4 Disputes over the time of destruction

If the creditor claims that the pawned property perished while it was being utilized, while the debtor claimed that it perished outside the utilization period, then the Ḥanafīs ruled that the creditor's claim is thus accepted if backed by his oath. They based their ruling on the view that the debtor is the claimant in this case, and thus he needs to provide a material proof, otherwise the creditor's claim as the denier will be accepted based on his oath.<sup>7</sup>

## 74.5 Disputes over the pawned property

The Ḥanafīs ruled that the creditor's claim is accepted if he claims that a particular property is the one pawned with him, while the debtor claims that another property was pawned. This ruling is based on the fact that the creditor is the holder of the disputed property.<sup>8</sup>

Similarly, they accept the claim of the creditor if the debtor disputes the price obtained upon selling the pawned property, or whether or not they should rely on the market price of similar goods. They based this ruling on the view that the pawned property is no longer part of the pawning once it is sold, and creditor guaranty is thus attached to the price. Hence, the debtor is viewed as the party claiming that the creditor should guarantee more, while the creditor is denying his claim. Thus, the creditor's claim should be accepted if backed by his oath.<sup>9</sup>

## 74.6 Disputes over possession

The Mālikīs ruled that if the debtor claims that the pawned property should be held by a trustee, while the creditor claims that he should hold it, then they accept the debtor's claim.<sup>10</sup>

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<sup>7</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.364).

<sup>8</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.347).

<sup>9</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.174).

<sup>10</sup>Al-Dardīr ((Mālikī)A, vol.3, p.244).



Part XI

Settlement (*Al-Sulh*)



## Preliminaries

We shall discuss settlement contracts in four chapters:

1. Definition, legality, types, and cornerstones.
2. Settlement conditions.
3. Legal status of the contract.
4. Factors that invalidate a settlement contract, and the legal status of an invalid settlement.



## Chapter 75

# Definition, Legality, and Cornerstones

### 75.1 Definition

Settlement refers linguistically to the resolution of disputes. Juristically, it refers to a contract that resolves a dispute.<sup>1</sup> The Ḥanbalis expressed it differently by saying that settlement “is a contract that leads to reconciliation between disputing parties. Settlements often reach their objective by compensating the claimant with less than the disputed claim.”<sup>2</sup> We are only concerned here with settlements of financial disputes among people, rather than settlements of disputes between Muslims and their enemies, national leaders and transgressing citizens, or two disputing spouses.

### 75.2 Legality

Settling disputes is a highly recommended practice. In this regard, it is acceptable for a ruler to advise disputing parties to reach a settlement, provided that he does not force them or pressure them to do so. Thus, if the ruler cannot discern which party’s claim is valid, he should encourage them to settle their dispute. However, if he can determine the party with the valid claim, he should enable that party.

Proofs of the legality of settlement is available in the Qur’ān, the Sunnah, and consensus:<sup>3</sup>

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<sup>1</sup>Ibn Al-Humām ((Ḥanafī), vol.7, p.23), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.29), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.493), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.177), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.70).

<sup>2</sup>Ibn Qudāmah (, vol.4, p.476), Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.118).

<sup>3</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.123), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.177), ‘Ibn Qudāmah (, vol.4, p.476), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.378), ‘Ibn Juzayy ((Mālikī), p.337).



- Proof from the Qur’ān can be found in the verse: “If a wife fears cruelty or desertion from her husband, there is no blame on them if they arrange an amicable settlement; and such settlement is best...” [4:128].
- Proof is also provided in the Sunnah, based on the Ḥadīth that was narrated with a full chain, and with a chain terminated at ‘Umar: “Settlement of disputes between Muslims are permissible, provided that they do not render forbidden something that is permissible, or render permissible something that is forbidden”.<sup>4</sup> In this regard, examples of a settlement to permit what is forbidden include settlements that permit trading in wine, or that compensate the claimant for more than his claim. On the other hand, examples of settlements that forbid what is permissible would include a settlement between a man and his wife that he will not divorce her, or that he will not have marital relationships with his other wife.
- Jurists have also reached a consensus on the legality of settlements, since it is one of the most beneficial contracts that lead to the resolution of disputes and disagreements.<sup>5</sup> In this regard, jurists agree that settlements most often takes place for less than is claimed in the dispute.

The reason for permitting settlements is clearly to protect brotherhood among Muslims by removing divisive disputes. In this context, one might quote the Ḥadīth: “Do not hate one another, envy one another, or cut your relations with one another; but be Oh slaves of Allāh as brothers”. In another Ḥadīth, he (pbuh) said: “After I die, do not return to being unbelievers, killing one another”. Indeed, a certain amount of lying is permitted if it assists in resolving disputes and restoring friendship. In this context, Al-Bukhārī and Muslim narrated a Ḥadīth: “The one who tries to remove disputes and animosity by transmitting good comments to disputing parties is not considered a liar”.

### 75.3 Types of settlement

Settlements can be used to resolve disputes between Muslims and non-Muslims with whom they have a truce or treaty, between transgressors and trustees, between two disputing spouses, between parties of non-financial disputes, and between parties of financial disputes. In this chapter, we are mainly concerned with settlements of financial disputes.

The Mālikīs classified settlements into two categories: (i) settlements through absolution and dropping of claims, which is permitted unconditionally, and (ii) settlements for a compensation, which is permissible unless it leads to forbidden practices. The second type of settlement inherits the legal status of sales.

<sup>4</sup>Al-Tirmidhī considered this a good and valid Ḥadīth. We have given a full analysis of this Ḥadīth in the part on deposit contracts, as narrated by ‘Abū Dāwūd, Al-Ḥākim and ‘Ibn Hibbān on the authority of ‘Abū Hurayrah, and by Al-Tirmidhī, ‘Ibn Mājah and Al-Ḥākim on the authority of ‘Amr ibn ‘Awf, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.122), ‘Ibn Ḥajar (, p.249), Al-Shawkānī (, vol.5, p.254).

<sup>5</sup>Indeed, that is why a certain amount of lying is permitted in effecting settlements.



Moreover, financial settlements may be classified into (i) settlements between the claimant and the claimed debtor, or (ii) settlements between the claimant and a third party. For each of those two types, the settlement may be classified into one of three types:

1. A settlement may be reached for less than the contested claim, while the claimed debtor may admit that the larger claim is valid. Muslims are in consensus that such settlements are permissible.<sup>6</sup>

If such settlements are concluded by delivering a less valuable property in place of the claimed property, then the contract is in fact a sale in which one property is exchanged for another with both parties' consent. Thus, preemption rights (*shuḥḥ*) apply if the compensation is real estate, the compensation may be returned based on defects, conditional options may be included, ignorance of the compensation would render the settlement defective,<sup>7</sup> and the compensation must be deliverable.

If a claim for property is settled by delivery of usufruct (e.g. the right to dwell in a house), then the contract is in fact a lease, in which property is exchanged for usufruct. Thus, the lease must be timed, and it would be voided if either party dies during the lease period. In this regard, contracts are classified based on their consequences, rather than their names.

2. Alternatively, the claimed debtor may deny the validity of the claim, but settle for part of the claim in any case. This is the most common form of settlements. It is deemed permissible for the Mālikīs, Ḥanafīs, and Ḥanbalīs, and impermissible for the Shāfi'īs and 'Ibn 'Abī Laylā.<sup>8</sup> In this regard, those who permit this type of settlement require that the claimant believes that his claim is valid, while the other party denies the validity of the claim, thus settling for part of the claim only to end the dispute and animosity.<sup>9</sup> For instance, A may claim that B owes him a house, while B denies the claim. Then A may demand that B takes an oath to support his denial. To avoid taking the oath, and to end the dispute and animosity between them, A and B may continue to support their respective positions, but agree to reach a settlement for a sum of money that B delivers to A.<sup>10</sup>

The majority of jurists rendered this type of settlement permissible based on the verse “and such settlement is best” [4:128], as well as the Ḥadīth:

<sup>6</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.139), Al-Kāsānī ((Ḥanafī), vol.6, p.40), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.23), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.30), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.290), Al-Dardīr ((Mālikī)A, vol.3, p.309), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.177), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.333), 'Ibn Qudāmah (, vol.4, p.482), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.118), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.163), 'Ibn Juzayy ((Mālikī), p.238).

<sup>7</sup>But ignorance of the claim does not render it defective. This follows since ignorance of the agreed-upon compensation may lead to further disputes, while ignorance of the settled claim does not.

<sup>8</sup>ibid., Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), p.179 onwards), 'Ibn Qudāmah (, p.467).

<sup>9</sup>'Ibn Qudāmah (, vol.4, p.478), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.120).

<sup>10</sup>'Ibn Hubayrah ((Ḥanbalī), vol.1, p.174).



“Settlements between Muslims are valid, provided that they do not permit what is forbidden or forbid what is permitted”. Thus, they ruled that all settlements are permissible unless there is a proof to the contrary. Indeed, ‘Umar (mAbpwh) said: “Encourage settlements among disputing parties, for legal rulings to settle such disputes can establish animosity”. Also, ‘Abū Ḥanīfa said: “Settlement of denied claims is one of the most permissible contracts”, meaning that it is permissible and preferred as a means of settling disputes and ending animosity.

The Shāfi‘īs and ‘Ibn ‘Abī Laylā ruled that such settlements are impermissible, based on analogy to the impermissible case wherein a man denies his wife’s claim for divorce in exchange for financial compensation (*khulʿ*), and then reaches a settlement for a different amount of money. They also argued that if the claimant was lying, then the settlement would allow him to take the other party’s property in a “legal” but forbidden way. On the other hand, they argued, if his claim was in fact valid, and he exchanged it for something other than what he was entitled to, then the exchange is invalid in analogy to selling the property of another person. Moreover, they argued that settlements are in fact a commutative or exchange contract wherein one side never gives a compensation, thus invalidating the contract in analogy to financial settlement in lieu of the penalty for libel. Thus, they argued that the claimant in this case would be consuming the other’s property unlawfully, and falling into his (pbuh) exception of settlements that “permit what is forbidden or forbid what is permissible”. In the meantime, the other party is seen to give his property only to end the dispute and animosity, which thus makes the practice similar to paying a bribe.

The majority of jurists do not agree with this logic. Indeed, they do not consider settling a disputed claim to be what is meant by “forbidding what is permitted or permitting what is forbidden”. Rather, this phrase is understood to refer to settlements that enslave a free person, permit a forbidden sexual relation, or permit trading in wine or pork. Moreover, they questioned the minority’s denial of the validity of taking a compensation other than the claim, saying that the claimant is free to take his established right in any way he wishes.

They also reject the view that the settling party is paying a bribe. Rather, they view it as a noble means of avoiding the psychological and social trouble of taking the dispute to a court of law. In this regard, Islamic Law does not forbid people from spending their wealth to protect themselves and their reputations. Moreover, the claimant is not receiving a bribe, since he is in fact receiving a compensation for his established right, whether what the compensation is of the same or different genus, and in the same or lesser amount than his claim.

3. Finally, the person against whom the claim is made may neither admit nor deny the claim. In this case, the majority of jurists, including ‘Ibn



‘Abī Laylā approve of the settlement. However, the Shāfi‘īs consider settlements in this case to be impermissible. The proofs for each group are the same as we have discussed in the case of denying the claim. In this regard, the Shāfi‘īs do not distinguish between the cases of denying the claim and saying nothing about it.<sup>11</sup>

In summary, the Ḥanafīs approve of all three types of settlement. Thus, they ruled that the compensation given to the claimant in the settlement becomes his property, and the claim is dropped. This ruling is based on the fact that the purpose of the settlement contract is legalized as a means of ending disputes, to fulfill the injunction in the verse: “...and do not fall into disputes” [8:46]. In this regard, the Ḥanafīs recognize the right of the claimed debtor to deny the claim or be silent about it, while agreeing to a settlement to avoid having to support his denial of the claim with an oath, and to avoid animosity. Thus, he may keep the claimed property based on his claim that it belongs to him. In the meantime, the claimant may take possession of what he is given in the settlement as compensation for what he claims to be his property. Thus, each of the two parties is treated according to his understanding of the situation.<sup>12</sup>

### 75.3.1 Shāfi‘ī classification

The Shāfi‘īs classified settlements into two categories, with numerous subcategories thereof. In what follows, we shall discuss those classifications and the corresponding rulings in some detail.<sup>13</sup>

#### Settlement with the claimed debtor

There are two types of such settlements:

1. The person against whom the claim is made may acknowledge the validity of the claim, and then the two parties may reach a settlement. As we have seen, all jurists agree that this type of settlement is permissible. However, there are two further subcategories to be considered:
  - (a) The claim may be for a non-fungible property. Then, if the settlement involves giving the claimant another non-fungible property, then there is an implicit sale of the claimed property to the claimed debtor. Therefore, even though the exchange is given the name “exchange settlement”, it is in fact a sale in which all the rulings for sales apply, including preemption rights, rights to return based on defects, and prohibition of dealing in the property prior to its receipt. Moreover, if the claimed property and the settlement property are *ribawī* goods, then all the rules of receipt must be applied. Moreover, other

<sup>11</sup> *ibid.*

<sup>12</sup> *c*Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.164).

<sup>13</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, pp.177-182).



rulings for sales apply, such as the various options, becoming defective based on defective conditions, and becoming defective based on ignorance or excessive uncertainty.

If the settlement property was usufruct and the claimed property was a non-fungible, then the contract is in fact a lease, to which all the rulings of leases apply. On the other hand, if the settlement property was the usufruct of the very claimed property (e.g. timed usufruct of a claimed house), then the contract is a simple loan, to which all of its rulings must apply.

Finally, if the settlement property is a portion of the claimed property (e.g. a quarter of the claimed car), then the contract is in essence a gift of the remainder of the property from the claimant to the possessor. Thus, the rules of gifts (e.g. consent of the recipient, etc.) must be applied to this case, which is labeled “reduction settlement”, since the claimant has thus given up part of his claim.

- (b) Alternatively, the settlement may be in lieu of a debt. In this case, the settlement may be validly concluded with a contract name of settlement, sale, absolution, reduction of debt, or lease. However, for this settlement to be valid, the claimed debt must be one for which a compensation (fungible, non-fungible, or usufruct) can be given. Thus, it is not permissible to settle a liability for the object of a contract for which no alternative compensation is allowed (e.g. *salam*).

The permissibility of settling debts in general is based on the Ḥadīth narrated by Al-Bukhārī and Muslim on the authority of Kaʿb ibn Mālik (mAbpw) that “<sup>c</sup>Abdullāh ibn ʿAbī Ḥadrad (mAbpw) asked him in the Masjid to repay a debt he owed him, and their voices got so loud that the Prophet (pbuh) heard them and opened his door. The Prophet (pubh) then called for Kaʿb ibn Mālik, and told him: ‘Give up a portion of the debt’, and Kaʿb said: ‘I have’. Then the Prophet (pbuh) said: ‘Then go and collect your debt’.”

2. The Shāfiʿis considered a settlement with the claimed property invalid if the claimed debtor denied the claim, or failed to acknowledge it. For instance, if the claimant claims that the other party owes him a house, and the other party does not acknowledge it, but then they settle, the settlement is deemed by the Shāfiʿis to be invalid regardless of which party gets the house under the settlement. They based this ruling on the view that if the claimant was lying, then he may get property that does not belong to him, while if he is truthful, he may be forbidding himself from taking his rightful property. Thus, they ruled that this case necessarily qualifies under the category of “forbidding what is permissible or permitting what is forbidden”.



**Settlement with a third party**

If one party makes a claim on another, and then a third party comes to settle the dispute with the claimant, then the settlement may take one of four forms:

1. The third party may claim to be an agent of the claimed debtor, and say that his principal acknowledges the validity of the claim, but fears making his acknowledgement public lest the claimant may take the property away. Then, they ruled that the settlement between the claimant and the third party is valid, since claims of agency are permissible in financial transactions.
2. The third party may settle the claim for a non-fungible property by giving the claimant a non-fungible property of his own, or by establishing a debt upon himself. This type of settlement is also deemed to be valid, as if the third party had bought the claimed property in an explicit sales contract.
3. The claimed debtor may deny the claim, but the third party may say that he believes the claimant, and proceed to settle the claim himself. This contract would have the same legal status as buying usurped property from the usurper. Thus, if the third party is capable of taking the claimed property from its possessor, the settlement would be valid, otherwise it would be invalid.
4. If the claimed debtor denied the claim, and the third party did not express his agreement with the claimant, but proceeded to settle the dispute anyway, then the settlement is invalid and nugatory. This ruling follows since that practice is tantamount to buying property from a party for whom ownership was not established.

**Contracts implied by settlements**

A settlement may be implicitly classified as one of six contracts:<sup>14</sup>

1. Implicit sales: If the claimant claims that he owns property in the possession of another, and the claim is settled for money, then the contract is in fact a sale. The technical term for this contract is “commutative settlement”.
2. Implicit gifts: If the claim for a property is settled for part of that property, the rest of the property is in fact a gift from the claimant.
3. Implicit leases: If the claim for a non-fungible property is settled for the timed usufruct of a different property (e.g. residence in a known house for a known period of time), then the contract is in fact a lease.

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<sup>14</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.177-179), ‘Ibn Hubayrah ((Ḥanbalī), vol.1, p.169 onwards).



4. Implicit simple loans: If the claim for a non-fungible property is settled for the usufruct of the same property, then the contract is in fact a simple loan (timed or unconditional).
5. Implicit absolution: If the claim for a fungible debt is settled for a portion thereof, then the contract is in fact an absolution of liability for the rest of the debt.
6. Implicit *salam*: If the claim is settled for a debt established as a liability (e.g. a dress of specific characteristics permissible for *salam*), then the contract is in fact a forward contract (*salam*).

## 75.4 Cornerstones of Settlement

The Ḥanafis stipulate offer and acceptance as the cornerstones of a settlement contract. Thus, if an offer (e.g. “I settle your claim for such and such”) and acceptance (e.g. “I accept”) are uttered, then the settlement contract is concluded.<sup>15</sup> On the other hand, the non-Ḥanafis stipulated four cornerstones for the settlement contract: (i) two contracting parties (settlers), (ii) contract language (offer and acceptance), (iii) underlying claim, and (iv) settlement compensation.

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<sup>15</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.40), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.23), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.493).



## Chapter 76

# Settlement Conditions

There are a number of conditions for the settlement contract, pertaining to the contract language, the contracting parties, the underlying claim, and the settlement compensation.

### 76.1 Contract Language Conditions

A settlement contract must be concluded with a valid language of offer and acceptance. The valid language may use the term “settlement”, or if the context allows it may use the terms “absolution”, “claim reduction”, etc.

### 76.2 Conditions for the settling party

The settling party must satisfy the following conditions:<sup>1</sup>

1. The settling party must be eligible to perform the transaction. Thus, settlements of insane individuals and small non-discerning children are not valid. However, Ḥanafis do not require the settling party to be of legal age, and hence consider settlements by an authorized discerning child to be valid if they are purely beneficial, or if there is no apparent harm in the transaction. In contrast, the Shāfiʿis required the settling party to be of legal age, and thus invalidate settlements of children below the legal age, even if they are discerning.
2. The settlement must not be clearly harmful for the benefits of a young child, whether the child is a claimed debtor, or his guardian is a claimant on his behalf.

Thus, if the father of a child settles a claimant’s claim on the child’s property, then the settlement is valid if the claimant can provide material proof, and the father settled for the value of the claim or slightly more. This

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.40 onwards), Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.493 onwards).



ruling follows since this type of settlement is a commutative contract, and the father is permitted to engage in such contracts at the correct compensation or slightly more. However, if the claimant had no material proof, then the settlement is not permissible. In the latter case, settlement would be tantamount to voluntarily contributing the child's property, which is purely harmful and thus not permissible for the father. In this case, the father may settle out of his own property, thus not harming the child's property, while benefiting the child by terminating the dispute.

Conversely, if the father of a small child claims that a person owes some property to his son, then the settlement is not valid if the father has a material proof (e.g. a bond) of the claim, and the settling party settles for less than the established claim. This ruling follows since agreeing to a claim reduction involves a contribution out of the child's property, for which the father is not authorized. On the other hand, if the claim is settled at or slightly below the claimed amount or value, then the settlement is valid. In the latter case, the settlement is tantamount to a sale, and the father is authorized to engage in sales on behalf of his small child.

3. Any party settling on behalf of a small child must be authorized to deal in his property (e.g. his father, his grandfather, or his plenipotentiary), since settlement of claims is a form of dealing in property.
4. 'Abū Ḥanīfa ruled that the settling party must not be an apostate male, based on his general ruling that all dealings of an apostate are suspended. On the other hand, 'Abū Yūsuf and Muḥammad ruled that the settlements of an apostate male are valid, since they ruled generally that his dealings are executable. All three agreed that settlements by an apostate female are permissible.

### 76.3 Settlement compensation conditions

There are four conditions that the compensation must satisfy. In what follows, we shall discuss those conditions in some detail.

#### 76.3.1 It must be a property

The settlement compensation must qualify as property.<sup>2</sup> Thus, settlement of claims for pork, dead animals, and other forbidden animals is deemed invalid, since such items do not qualify as property. This ruling follows from the fact that settlement constitutes a form of commutative dealing, and hence the settlement compensation must satisfy the conditions of compensations in sales.

The compensation can be fungible, non-fungible, or the usufruct of property, since all such properties qualify as compensations in commutative financial contracts. However, some settlement compensations require receipt during

<sup>2</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.42), Majma' Al-Ḍamānāt (p.390).



the settlement contract, while others do not, and this requires more detailed analysis.

In this regard, the Ḥanafis recognized that the claim be for one of four types of property:

- Non-fungible properties that can be identified by genus, type, amount, characteristics and ownership. Examples include clothes, real estate, animals, wheat or barley measured by volume, or metals like iron and copper measured by weight, etc.
- Fungible properties that cannot be identified. Examples include money, liabilities for goods of certain characteristics measured by weight and volume, etc.
- Usufruct such as residence in a particular house.
- Legal rights such as retribution for certain crimes.

On the other hand the compensation given in settlement may be non-fungible property, fungible property, or usufruct. Moreover, as we have seen, the person against whom the claim is made may acknowledge the validity of the claim, deny it, or refrain from acknowledging or denying it. In what follows, we discuss the legal status of the settlement in each of those cases.

### Acknowledged claims for non-fungibles

The settlement is valid if the claim is for non-fungible property, the person against whom the claim is made acknowledges the claim's validity, and the settlement compensation is known in amount and characteristics, regardless of whether the latter is fungible or non-fungible. In this case, the compensation in settlement has the same status as the price in a sale, and hence all such compensations are permissible.

In this regard, if the compensation in settlement is an existent, identified, and owned non-fungible, then the settlement is valid regardless of whether or not the non-fungible was measured by weight or volume. Similarly, the settlement is valid if the compensation is a fungible measured by weight or volume, and if it is known in quantity and characteristics. As we have seen, those rulings follow from the fact that such compensations can serve as prices in sales contracts.

In contrast, the settlement is not valid if the compensation are clothes established as a liability with certain characteristics. This ruling follows from the fact that the conditions of *salam* are not satisfied in this case, and clothes can only be established as a liability if all the conditions of *salam* are satisfied (e.g. the amount, characteristics, and term of deferment must all be specified explicitly). This is in contrast to the cases of goods measured by weight or volume, which can be established as a liability in a variety of commutative contracts. Thus, the latter types of goods can serve as prices without specifying a term of deferment, and without receipt during the contract session.



If the compensation is an animal with certain characteristics established as a liability, then the settlement is not valid. This ruling follows from the fact that such properties are not eligible for establishment as liabilities in commutative financial contracts, and thus cannot serve as a price.

### Acknowledged claims for fungibles

#### Monetary debts

If the underlying claim is for an amount of money, then the settlement may involve a compensation of the same genus or one of a different genus. If the compensation was of a different genus, and specified and known property, then the settlement is valid, and tantamount to trading a debt for a non-fungible property. However, if the compensation is itself a liability for money of a different genus, then the settlement is impermissible, lest the parties engage in trading debts for debts.

On the other hand, if the compensation was of the same genus as the claimed liability, then the settlement is valid if the compensation is equal to the claimed liability. The settlement is also deemed valid if the compensation is smaller than the claimed liability in amount or quality, in which case the claimant is deemed to have contributed the rest of his right to the settling party.

However, if the claim for a monetary liability is settled for a larger amount (in quality or quantity) of the same genus, then the settlement is a form of forbidden *ribā* and thus deemed invalid. In this regard, the general juristic rule is that settlement of the same genus as the claim are considered a form of repayment if possible, otherwise, they are considered commutative contracts and subject to the conditions of such contracts.<sup>3</sup> In this context, the compensation with a larger amount of the same genus cannot be considered a repayment of part and dropping of the rest of the debt, and hence the contract must be considered a commutative contract to be subjected to its conditions.

In this regard, if the compensation was of higher quality but equal amounts, then the conditions of currency exchange (*ṣarf*) must be applied, thus requiring mutual receipt during the contract session. This ruling follows from the fact that quality is disregarded when trading *ribawī* goods of the same genus. Thus, if the compensation is not received during the settlement session, the contract is voided since it is thus tantamount to a currency exchange contract that violates the receipt condition.

The majority of Ḥanafīs also ruled that if the compensation is of higher quality but lower amount than the claimed debt, then the contract is impermissible. They based this ruling on the view that the higher quality might have been implicitly justifying compensation by a smaller amount. Such substitution of quality for quantity is not permissible in *ribawī* goods, since all such goods of the same genus are considered identical regardless of quality. Indeed, this maxim is a juristic rule that was also narrated as a Ḥadīth: “higher and lower quality [of

<sup>3</sup>Ibn Al-Humām ((Ḥanafī), vol.7, p.41), Al-Sarakhsī (1st edition (Ḥanafī), vol.21, p.27), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.41), Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.500).



*ribawī* goods] are the same [when traded for goods of the same genus]”.<sup>4</sup> In this regard, the contract has to be viewed as a *ṣarf* rather than repayment of the underlying liability, since a liability for low quality goods is not repaid in high quality goods. Once the contract is classified as currency exchange, it is well established that trading one thousand low quality silver coins for five hundred high quality silver coins is forbidden.

In summary, if the compensation is of the same genus and lower amount, then the settlement is considered a repayment of part of the liability, and an absolution of the remaining part. On the other hand, if the compensation is of the same genus and greater quantity, or if it is a fungible or non-fungible of a different genus, then the contract is considered a commutative contract.<sup>5</sup>

Consequently, it is permissible to compensate a matured liability for future with an equal deferred liability of the same genus.

This is thus considered a simple deferment of the debt. It is also permissible to compensate a deferred liability with a current and equal payment of the same genus, since the debtor is thus giving up his right of deferment and repaying his debt earlier.

On the other hand, it is not permissible to settle a deferred underlying debt with a smaller current payment of the same genus. In this case, the creditor is not entitled to an immediate payment, and hence the early payment cannot be viewed as a repayment. Thus, the contract must be viewed as a commutative contract, in which reduction of the debt is a compensation for the dropped deferment. Such trading of time for money is not permissible, since time is not a property. Moreover, trading the smaller amount for the larger amount of the same genus is not permissible.<sup>6</sup>

However, the settlement is valid if a smaller amount of the same genus is paid on the same day of the contract, and the underlying debt was currently matured. The Ḥanafīs agree that the debtor would thus have repaid part of the debt, and become absolved of the remaining part. However, if the debtor does not make the payment on the same day of the settlement contract, ‘Abū Ḥanīfa and Muḥammad ruled that the settlement is thus invalidated, and the debtor is responsible for the full amount of the debt. In contrast, ‘Abū Yūsuf ruled that the settlement would still be executed, and the debtor would only remain indebted for the part of the debt agreed upon in the settlement.

‘Abū Yūsuf based his ruling on the view that the settlement contract implicitly tied absolution of part of the debt to immediate repayment of the other part. However, he argued, absolution may not be tied to any conditions. Thus, unless the contract included an explicit condition of voiding if the agreed upon portion of the debt is not paid in the same day, the contract remains valid in

<sup>4</sup>Al-Zayla‘ī classified this as a strange Ḥadīth. However, the essence of this Ḥadīth is implied by the Ḥadīth of ‘Abū Sa‘īd Al-Khudriy: “Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, same for same, hand to hand, and any increase or diminution is *ribā*; the taker and the giver are equal in this”, narrated by Muslim, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.37).

<sup>5</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.44), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.42), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.500).

<sup>6</sup>Ibn Al-Humām ((Ḥanafī), vol.7, p.42).



his view. Thus, absolution for the remainder of the debt continues to be valid even if the debtor does not pay the agreed upon part on the day of the contract.

In contrast, 'Abū Ḥanīfa and Muḥammad ruled that the implicit condition to void the contract if the agreed-upon portion of the debt is not paid is as effective as an explicit condition thereof. In this regard, they ruled in an analogous case that it is permissible to sell a property to another on condition that the price is paid on the same day, otherwise the sale is voided. In both cases, the condition of immediate payment applies to the voiding, and not to the contract itself. Thus, they ruled that the case under consideration is equivalent to a settlement contract in which the creditor said: "but if you do not pay me today, then this settlement is voided", in which case that condition would be observed.

Thus, we see that the Ḥanafīs agreed on the case where the creditor says: "I settle your debt of \$1000 for \$500, provided that you pay me today, otherwise you still owe me \$1000". In this case, if the debtor does not pay \$500 on that day, the settlement is voided and he still owes \$1000. They are in agreement on this case since the condition of voiding is stated explicitly. Similarly, they ruled that the settlement is valid if the condition said "... provided that you pay me within a month, otherwise you still owe me \$1000", and that condition must be observed. In the latter case, the absolution is immediate, but its voiding is suspended for a month.

It is also permissible for the creditor to accept a guarantor of the debtor's \$1000 debt, as part of a settlement with for \$500, on condition that the \$500 are paid within a month, otherwise the settlement is voided. Then, if the guarantor does not pay the \$500 within the month, he is liable for the full \$1000. This same ruling applies if the guarantor accepted the guaranty separately, and then engaged in a settlement as stated above. Indeed, the condition would be more worthwhile of observing in the second case, since it thus pertains to voiding the reduction of liability only, and does not pertain directly to the contract.

However, the Ḥanafīs ruled that the settlement is invalid if the creditor said to the debtor who owes him \$1000: "If you pay me \$500, then you are absolved of the rest". This ruling follows from the fact that the creditor's statement thus makes absolution suspended pending the condition of payment, which is not permissible. Thus, the debtor would remain liable for the full \$1000, unless the creditor absolves him of the other \$500 at a later time unconditionally.<sup>7</sup>

### Non-Monetary debts

If the underlying debt is a fungible non-monetary good, measured by weight or volume, then we need to consider two cases, depending on whether or not the settlement compensation is of the same genus:<sup>8</sup>

1. If the settlement compensation is of the same genus as the underlying debt, then the settlement is valid if the compensation is equal to the underlying

<sup>7</sup> Al-Kāṣānī ((Ḥanafī), vol.6, p.44 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.42 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.43 onwards).

<sup>8</sup> Al-Kāṣānī ((Ḥanafī), vol.6, p.45 onwards), Al-Sarakhsī (1st edition (Ḥanafī), vol.21, p.26 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.42).



debt in quantity and quality, and if it is received during the settlement session. In this case, settlement is in fact a repayment of the debt.

It is also permissible to settle the underlying debt for a smaller amount of goods of the same genus, in quantity or quality. In this case, the settlement is not a commutative contract. Rather, it is viewed as a partial repayment of the underlying debt, and an absolution or dropping of the remaining part if the compensation is smaller in quantity, and dropping the quality constraints if it is smaller in quality. In either case, receipt during the contract session is not required in such partial settlements.

On the other hand, the settlement is impermissible if the settlement compensation exceeds the underlying debt in quantity and at least matches it in quality, since the contract would in fact be *ribā*. However, if the settlement compensation matches the underlying debt in quantity, but exceeds it in quality, then the settlement is permissible, and viewed as a commutative contract.

2. The settlement is permissible if the non-monetary debt is settled for an amount of money. In this case, receipt during the settlement session is required to avoid trading a debt for a debt.

On the other hand, if the settlement compensation is a specified volume of another fungible, then the settlement is permissible provided, and receipt of compensation during the contract session is not required in this case. Similarly, the settlement is valid if the settlement compensation is a fungible established as a liability on the debtor (subject to quality and characteristics restrictions), provided that the compensation is received during the contract session, to avoid trading a debt for a debt.

In this regard, the settlement would be rendered impermissible if one debt is settled for another debt. For instance, if the debtor owed a volume of wheat, and settled it for a deferred debt of silver coins, the contract is invalid trading of debts for debts.<sup>9</sup>

### Liability for an animal

If the debtor owes the creditor an animal (e.g. as compensation for unintentional killing, dowry, or compensation for divorce at the instance of the wife), then it is permissible to settle the debt for any non-monetary fungible good measured by weight or volume. In this case, the contract is considered a commutative one, and receipt during the settlement session is required to avoid trading debts for debts.

The settlement is also permissible if the debt is settled for the animal's value or slightly more. This follows from the fact that the animal's monetary value is determined in a different genus (gold and silver), and thus the settlement is a commutative contract. In this regard, the compensation would be permissible regardless of amount, and receipt is not required in this case.

<sup>9</sup> *Al-Farā'id Al-Bahiyya fī Al-Qawā'id Al-Fiqhiyya* by Sh. Maḥmūd Ḥamza (p.146).



On the other hand, the contract is permitted but not considered a commutative one if the settlement is established as a monetary deferred debt. In this case, the contract is viewed as a form of repayment, and thus is not invalidated on the basis of trading debts for debts. This ruling follows from the fact that liability for the animal was non-binding, since the creditor is forced to accept repayment in monetary value, in contrast to most debts. Thus, even though the settlement results in replacing liability for the animal with liability for an amount of money, the contract is not really an exchange of one debt for another in the classical sense.<sup>10</sup>

### Compensating with usufruct

We have already covered the legal rulings associated with the underlying debt condition if the compensation is a fungible or a non-fungible property. We now turn to the case where the underlying debt is settled for the usufruct of a property. Such settlements are permissible. For instance, if the debtor owes the creditor \$10, he may settle it for the right to live a certain period in the debtor's house, ride his horse for a certain period, or use his land for a certain period, etc.<sup>11</sup> In this case, the settlement is in fact a lease contract, regardless of whether the debtor acknowledges the claim's validity, denies it, or declines to do either. The validity of this contract follows from the fact that leasing results in transferring ownership of the usufruct in return for some compensation. In this regard, the compensation is apparent (i.e. the underlying debt) if the debtor acknowledges the claim's validity, and implicitly determined in the other two cases as the termination of disputes, animosity and the requirement to take an oath. As a consequence of this classification of settlements of debts for usufruct as a lease contracts, all four schools of jurisprudence consider those contract to be valid or defective based on the lease contract rulings.<sup>12</sup>

<sup>10</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.46 onwards).

<sup>11</sup>The Ḥanafīs ruled that all compensations that are permissible in marriage contracts may be used as a settlement compensation, and vice versa, c.f. Al-Samarqandī ((Ḥanafī), vol.3, p.426). In this regard, any commonly valued property is eligible to serve as a dowry, c.f. *ibid.* (vol.2, p.201). In this regard, if a property cannot be named as dowry, then it is not permissible as a settlement compensation. If the underlying liability resulted from murder or manslaughter, or indemnity for criminal acts not causing loss of life, then the settlement compensation must be monetary.

It is noteworthy that the Ḥanafīs permitted the use of deliverable usufruct (e.g. the right to dwell in a house, or to ride an animal, etc.) as dowry, c.f. 'Ibn Al-Humām ((Ḥanafī), vol.2, p.450). However, the usufruct offered as dowry cannot be specified as the free husband's labor services (since the status of the husband is thus turned to the status of a servant), and it is not permissible to specify a dowry in terms of services for which a person cannot collect wages (e.g. Qur'anic education, which is not a property).

<sup>12</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.47), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.31), Al-Dardīr ((Mālikī)A, vol.3, p.310), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.178), 'Ibn Qudāmāh (, vol.4, p.483).



### 76.3.2 It must be valued property

It is invalid for a Muslim to settle his debts with pork or wine, since such items are not valued properties for Muslims.<sup>13</sup> However, if the settlement is concluded for such compensation, then it is executed as an absolution of the debt rather than a commutative contract.

### 76.3.3 Ownership

The debtor must own the settlement compensation. Thus, if the debt is settled for a property, and then the owner demands to recollect it from the creditor, the settlement is rendered invalid.<sup>14</sup>

### 76.3.4 Knowledge

The settlement compensation must be devoid of ignorance. This ruling follows from the fact that such ignorance would lead to disputes, and thus render the contract defective.<sup>15</sup>

## 76.4 Underlying liability conditions

There are a number of conditions that the settled liability must satisfy. We shall list those conditions in this section.

### 76.4.1 Liability to man

The settled liability must be towards a human being, rather than towards Allāh, regardless of whether it is a liability for fungible or non-fungible property, or for non-properties as in the cases of retribution and chastisement.<sup>16</sup> Thus, settlements of legal punishments (*ḥudūd*) for adultery, theft, and imbibing wine are invalid. In this regard, no man can demand to settle the transgressor's liability for a sum of money to collect, since the right in this case belongs to Allāh. In this regard, receiving settlement compensations for the rights of others is impermissible. Moreover, this sort of settlement would be tantamount to making lawful that which is forbidden, or making forbidden that which is lawful.

Similarly, it is invalid to pay a settlement compensation in lieu of the legal punishment for libel. In this regard, even though the insulted person has some rights, the Ḥanafis consider the right of Allāh to be primary in libel punishments.

Similarly, it is invalid to settle with a witness so that he would not testify against the liable party. This ruling also follows from the fact that the witness

<sup>13</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.47 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.33), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.36).

<sup>14</sup>Al-Kāsānī ((Ḥanafī), ibid., p.48).

<sup>15</sup>Al-Kāsānī ((Ḥanafī), ibid.), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.493).

<sup>16</sup>Al-Kāsānī ((Ḥanafī), ibid.), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.37), 'Ibn Al-Humām ((Ḥanafī), ibid., p.34), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.493).



is responsible for his testimony that is a right of Allāh, which cannot be settled between people. In this case, if the witness indeed collected a settlement compensation, he must return it. Moreover, if a judge knows of the witness's acceptance of such compensation, he may void his testimony as a transgressor, unless the witness later repents and then his testimony may be accepted once again.

On the other hand, the four schools of jurisprudence agree that settlement is permissible in the rights to retribution for the destruction of life and limb. They based this ruling on the view that retribution is a right for human beings, and thus may be settled with a fungible or non-fungible compensation. However, they ruled that if the compensation is fungible, then it must be received during the settlement contract session to avoid departing with one debt having been exchanged for another.<sup>17</sup>

In the latter cases, the jurists also ruled that the settlement compensation must be sufficiently known. Thus, if the settlement compensation is simply named as a dress, an animal, or a house, there would be significant ignorance regarding the compensation, thus rendering the settlement impermissible. The tolerated level of ignorance in this case is based on the general rule that levels that invalidate a compensation from serving as dowry (*mahr*) in marriage invalidate them from serving in settling retribution rights, and vice versa.

In this regard, if the compensation contains sufficient ignorance to be deemed ineligible for dowry and settling retribution, then the groom is liable for an average dowry in the case of marriage. In the case of settling retribution, the right to exact physical punishment is dropped by the settlement contract, and proper financial compensation thus becomes a liability on the debtor.

However, there is a fundamental difference between the two cases: If the retribution right is settled for pork or wine, the right is thus dropped and the debtor is considered absolved. In contrast, the groom is still liable for an equivalent dowry if he used such ineligible compensations as a dowry. This difference is based on the view that the very term for "settlement" (*Al-ṣulh*, in Arabic meaning reconciliation), implies forgiveness in the case of retribution for crimes. Thus, if the settlement of such retributions does not name a valued property, the jurists rule in analogy to the case where no compensation was named at all, thus implying absolution and forgiveness. In contrast, absolution of the liability for dowry is not possible, since marriage contracts were only legalized based on the payment of a dowry. Thus, if the named dowry was not a valued property, jurists rule that a dowry was not named, and hence a dowry must be assessed by the average paid in similar marriages. Thus, the fundamental difference is that settlements may take place without a compensation, while marriage requires a compensation.<sup>18</sup>

In this regard, settling retribution rights are permissible for any amount, regardless of whether the compensation exceeds or fall short of the legally spec-

<sup>17</sup>Al-Kāsānī ((Ḥanafī), *ibid.*), Al-Sarakhsī (1st edition ((Ḥanafī), vol.21, p.9), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.35), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.32), Al-Dardīr ((Mālikī)A, vol.3, p.317), 'Ibn Qudāmāh (, vol.4, p.494 onwards).

<sup>18</sup>'Ibn Al-Humām ((Ḥanafī), vol.7, p.33), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.35).



ified financial liability for the underlying transgression. This ruling is based on the verse: “But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude” [2:178]. ‘Ibn ‘Abbās stated that this verse was revealed regarding pre-meditated murder. In this regard, the word “any” (*shay*) implies that any compensation is permissible, no matter how small or large.

In contrast, it is not permissible to pay a settlement compensation that exceeds the legal compensation for unintentional manslaughter. In the latter case, any increase over the legally ordained amount is considered forbidden *ribā*. Thus, this case is contrasted with settlement compensations for the right to physical retribution for pre-meditated murder, which is not a property. Thus, the latter case does not involve a legally ordained financial value, and *ribā* is impossible.<sup>19</sup>

### Settling uncertain liabilities

The Ḥanafīs and Ḥanbalīs allow the liability underlying a settlement to be unknown, regardless of whether it is fungible or non-fungible. Thus, they allow a debtor who acknowledges the creditor’s claim to settle that claim for a known compensation, although neither party may remember the exact amount of the underlying liability. This ruling follows from the fact that settlements can be validated both as a commutative contract, and as a dropping of the creditor’s right. In this regard, viewing settlement of unknown debts as a form of dropping, it can be validated in analogy to freeing slaves and divorce contracts. In this regard, since the settlement by repaying known debts is allowed, settlement of unknown ones would also seem appropriate lest the creditor’s property is wasted. In the latter case, the settlement is in fact a form of absolution rather than sale. This ruling is also supported by the narration that two men with a dispute over perished inheritance came to the Prophet (pbuh), and he told them: “Share in the loss, being careful to be as fair as possible, and then let each of you absolve the other of any obligations thereof”.<sup>20</sup> Ibn Qudāmāh ruled that this Ḥadīth pertains to settlement of unknown liabilities.

<sup>19</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.49), ‘Ibn Al-Humām ((Ḥanafī), vol.7, p.34), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.36), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.497).

<sup>20</sup>This Ḥadīth is narrated by ‘Aḥmad, ‘Abū Dāwūd and ‘Ibn Mājah, and its origin in the correct two books of Ḥadīth is narrated on the authority of ‘Umm Salamah, who narrated that two men came to the Prophet (pbuh) to settle a dispute between them over joint inheritance that had perished. The Prophet (pbuh) said: “You come to me to settle this dispute, but I am only a man. Indeed, one of you may be more clever in providing proofs for his claim, and I can only rule according to what I hear from you. Thus, if I give either one of you something that is rightfully his brother’s, let him not take it, for what I give him thus is a piece of the hell-fire that he will bring with him on the day of judgment as a red-hot piece of iron around his neck”. Hearing this, the two men cried, and each said: “I give all my rights to my brother”. The Prophet (pbuh) then said: “Having said that, go then and give each other an oath to give him his right, estimate those rights to the best of your abilities and divide them between you accordingly. Then, let each of you absolve his brother of all responsibilities thereof”. This Ḥadīth provides a proof of the permissibility of absolution from unknown liabilities, c.f. Al-Shawkānī (, vol.5, p.253).



In contrast, the Mālikīs and Shāfi'īs did not permit settlement of unknown debts. The Mālikīs thus ruled that the creditor must know the size of the debt that he is settling. The Shāfi'īs based this ruling on the view that settlement in this case is a form of sale, and thus would be invalidated if the object of the contract is unknown.<sup>21</sup>

#### 76.4.2 A right of the claimant

The object of settlement must be a right of the claimant. Thus, the settlement is deemed invalid if the settled right does not belong to the claimant.<sup>22</sup>

#### 76.4.3 The claimant's right must be established

The claimant's right must be established in for the settled liability. The following are examples of settlements that are not permitted due to violating this condition:<sup>23</sup>

- The settlement is invalid if a divorced woman sought settlement for paternal lineage on behalf of a child that she claimed to be her divorcing husband's. The contract is invalid since paternal lineage is the child's right, and the mother has no right to settle the rights of another for any compensation.
- The settlement is invalid if a person with preemption rights settles his right (to prevent the sale of a property) with a buyer, thus allowing the buyer to take possession of the property. The contract is invalid since the preemption right does not entitle that person to a right in the property, beyond the right to acquire ownership.<sup>24</sup> This is in contrast to settlement of the right to physical retribution against a murderer, since the right to such retribution is established at the time of settlement.
- The settlement is invalid if the guarantor of a person settles his liability under that guaranty with a known amount of property. Thus, the contract is invalid, and the guaranty remains binding, since the right of the creditor in the guaranty contract is to seek delivery of the guaranteed party. This right is thus similar to preemption rights, and may not be settled for property.

<sup>21</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.49), Majma' Al-Damānāt (p.388), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.32), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.493), 'Ibn Qudāmah (, vol.4, p.490), Al-Sha'arānī ((Shāfi'ī), vol.2, p.79), Al-Dardīr ((Mālikī)A, vol.3, p.310).

<sup>22</sup> Al-Kāsānī ((Ḥanafī), ibid.).

<sup>23</sup> Al-Kāsānī ((Ḥanafī), ibid.), Al-Sarakhsī (1st edition (Ḥanafī), vol.21, p.35), Majma' Al-Damānāt (p.358).

<sup>24</sup> Since the preemption right is a right to gain ownership, it does not exist prior to such a transfer of ownership, and thus the possessor of that right may not take any compensation for that right. Such compensation is thus considered a forbidden bribe, c.f. 'Ibn Al-Humām ((Ḥanafī), vol.7, p.33).



- The settlement is invalid if a man erected a tent on a public road, and then settled with a man who wanted to remove it. The contract is thus invalid since the right of passage through the public road pertains to all Muslims, and none of them have an exclusive and established right in it beyond that right of passage. Thus, that right of passage is not established except through passage, and may not be settled with another. Moreover, this settlement is useless since all others with a right of passage would still retain the right to remove the man's tent from the public road.<sup>25</sup>

On the other hand, if the tent was erected on a private road that belongs to a group of people, then it is permissible for the tent's owner to settle with any one of the road's owners to keep the tent. This follows from the fact that the land is thus jointly owned by a limited group of people, each of whom thus has ownership for part of the road. Thus, the tent's owner may settle with any one of the owners for his right to the road. Indeed, this settlement can be useful, since it is possible for the tent's owner to settle with every one of the road's owners. This is in contrast to the case of public roads, wherein settling with all Muslims is an unimaginable possibility.

- It is valid for a denier of a claim without material proof to settle simply to avoid swearing an oath, in which case the denier is absolved of the obligation to take an oath.
- On the other hand, the settlement is invalid if the claimant settles with the denier that "the denier is absolved of his liability if he swears that he does not owe the claimant", and then the denier swears such an oath. In this case, the settlement is invalidated, and the claimant may renew his claim if he can provide a proof later. This ruling follows from the fact that the language of the settlement thus suspends absolution pending the condition of swearing an oath. Since absolution results in transfer of ownership, it is invalid to suspend absolution pending any conditions, in analogy to other transfer of ownership contracts.

In this regard, if the claimant cannot provide a material proof, and he wishes to seek the denier's oath to back his denial, he may proceed in one of two ways:

- If the denier had not taken an oath in front of a judge, that oath may be disregarded, and the claimant may demand that the denier swear an oath in front of a judge.
- However, if the denier had already sworn an oath in front of a judge, then the claimant cannot demand that he swear another oath.
- Similarly, the settlement is invalid if the language of the contract specified that "if the claimant backs his claim with an oath, then the claim is

<sup>25</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.49), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.183), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.333).



binding upon the denier". In this case, even if the claimant does swear an oath, the denier is not liable to him. This contract is invalid since it involves suspending liability for property on a probabilistic condition, which renders the contract a form of forbidden gambling.<sup>26</sup>

- It is valid for a woman who denies a man's claim that he married her to settle his claim for some property. This ruling follows since the claimant is claiming a valid established right, and the woman may thus pay a settlement compensation for that right in analogy to divorce at the instance of the wife. Despite the fact that the woman in this case denies the man's marital rights, she is permitted thus to spend her property to drop the dispute.<sup>27</sup>

On the other hand, if the man claimed that he married the woman for \$1000, and she denies the claim, then the settlement is valid if he says "I increase the dowry to \$1100 if you accept my claim" and she accepts the marriage thus. In this case, her admission of the marriage at the increased dowry renders the settlement and marriage contracts valid.<sup>28</sup>

- In contrast, the settlement is not valid if a woman claimed that a man married her and the man denied her claim and then settled it for an amount of money. In this case, the marriage is either established or not established. If the marriage is not established, then the man's payment to drop the claim would not have any compensation and thus would be viewed as a bribe. On the other hand, if the marriage is established, it may not be dissolved through such a payment. Indeed, the dissolution of an established marriage would require that the woman pay the man, not the other way around. Thus, the money received by the woman is not a compensation in either case, and the settlement is not permitted.

This is contrasted with the reverse case where he made the claim, since the settlement of that claim in exchange for money paid by the denying woman can be viewed as divorce at the instance of the wife on his part, and a means of ending the dispute on hers.<sup>29</sup>

- If a man claims that another owes him \$1000 and the other party denies the claim, then it is not valid for the claimant to settle the claim for \$100 provided that the other party admits having owed him \$1000. In this case, the claimant is either truthful or lying in claiming the other's liability for \$1000. If he is truthful, then taking compensation to gain admission of his right is a form of forbidden bribes. On the other hand, if he is lying,

<sup>26</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.50).

<sup>27</sup> Al-Kāsānī ((Ḥanafī), *ibid.*), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.37), 'Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.496), Majmaʿ Al-Ḍamānāt (p.385).

<sup>28</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.51).

<sup>29</sup> Al-Kāsānī ((Ḥanafī), *ibid.*, p.50), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.35), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.37), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.165).



then it is not permissible for the claimed debtor to admit that he owed the \$1000 when he did not in fact owe that amount.<sup>30</sup>

- 'Abū Yūsuf and Muḥammad differed in opinion regarding the case wherein a man claims that another owes him property by virtue of a deposit, simple loan, silent partnership, or lease, wherein the claimed debtor says that he had returned the property, or that it had perished, and the claimant contests his claim. 'Abū Yūsuf considers the settlement of such a claim in exchange for some property to be invalid, while Muḥammad ruled that it was valid.

In this case, Muḥammad reasoned that the settlement was in lieu of a valid claim, which could be denied with an oath, and thus is a valid settlement. In contrast, 'Abū Yūsuf ruled that the claimant's statements in this case are self-contradictory, since the other party held his property in a possession of trust, and thus the claimant must accept his statements. Thus, from a legal point of view, the claimant is simultaneously making his own claim and the opposing claim issued by the other party. Such contradiction renders the claim invalid. However, the claimant may still demand that the other party backs his denial with an oath. The oath in this case is not required to remove the claim, since the claim is invalid, but rather to remove the charge of abuse or negligence. On the other hand, the settlement is invalidated by the invalidity of the underlying claim.<sup>31</sup>

#### Settlement in lieu of defective merchandise

If a buyer finds the merchandise defective, and the seller seeks to settle the dispute by reducing the price or giving him some other property, then the settlement is valid, provided that the merchandise was returnable based on the defect, or that the buyer could demand financial compensation for the defect. The settlement is considered valid since the underlying buyer's right that the merchandise be free of defects is well established, and thus may be the basis of a settlement.<sup>32</sup>

On the other hand, the settlement is not valid if the buyer was not entitled to return the merchandise or seek compensation for defects in the merchandise. Examples include cases where a separate increase in the merchandise occurs, or a defect takes place in the merchandise while it is in the buyer's possession. If the buyer is not entitled to compensation, then the settlement is not allowed, since the buyer would thus be taking the seller's property without giving anything in return.

If settlement in lieu of a defect in the merchandise was valid at inception, and then the defect was removed (e.g. a sick sold animal was healed), then

<sup>30</sup>Al-Kāsānī ((Ḥanafī), *ibid.*, p.51).

<sup>31</sup>Al-Kāsānī ((Ḥanafī), *ibid.*, p.50).

<sup>32</sup>Note that this type of settlement is permissible in normal sales, wherein one of the compensations may be larger than the other. However, if the sale can result in *ribā*, then the settlement is considered an increase, and hence impermissible based on the prohibition of *ribā*.



the settlement is thus invalidated, and the seller can take back the settlement compensation. This ruling is based on the fact that once the condition of safety from defects returns to the merchandise, the latter compensates for the price, and the seller thus has no more liabilities to the buyer.

If the buyer claims that the merchandise contains a defect, then the seller may settle with him, on condition on being absolved of the claimed and all other possible defects. This ruling follows from the fact that the buyer is entitled to absolve the seller of such defects, thus dropping his right to having merchandise that is free of all defects.

Even if the buyer does not claim to have found a defect, the buyer may give him some property to settle against all possible defects. This settlement is permitted since the buyer normally retains the right to claim that the merchandise is defective, and thus may settle to drop this right.

On the other hand, the buyer retains the right to seek compensation for other defects if the seller settles with him for any single claim of a defect, without specifying that he is settling against all other possible defects. Thus, settling a single claim does not preclude the buyer from issuing further claims for other defects, unless the settlement explicitly prevents him from doing so.<sup>33</sup>

### Claimant settlement with a third party

So far, we have considered the case where the settlement is settled between the claimant and the claimed debtor. However, if the claimant settles with an interceding or volunteering third party, we need to consider whether the latter acts with or without the permission of the claimed debtor:

- If the settlement is conducted with the second party's permission, then the settlement is valid, with the settling party being considered an agent of the claimed debtor. This ruling follows since agency is permissible in settlement contracts. In this case, the agent is not responsible for the debt, whether or not the claimed debtor acknowledges the claim's validity. Thus, the financial responsibility remains with the claimed debtor rather than the agent. The only exception to this rule is the case wherein the agent guarantees the settlement compensation, wherein his responsibility for the compensation is established by virtue of the contract of guaranty, rather than the settlement contract itself.<sup>34</sup>

The Shāfi'is agreed with this ruling. Thus, they ruled that the settlement is valid if conducted by a third party who declares that the claimed debtor acknowledged the claim's validity, and appointed him as an agent to settle it. They also ruled that the settlement is valid if the third party settles the claim out of his own property, while declaring that the claimed debtor

<sup>33</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.51), Al-Sarakhsī (1st edition (Ḥanafī), vol.21, p.6).

<sup>34</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.52), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.38 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.39 onwards), 'Abd Al-Ghānī Al-Maydānī ((Ḥanafī), vol.2, p.167).



acknowledged the claim's validity. In the latter case, the third party is legally considered to have bought the object of the claimed liability.

The Shāfi'is ruled that the settlement may be valid if the claimed debtor denied the claim's validity, but the third party settles out of his own property, declaring that he believes the claimant. In this case, if the claimed object of liability is non-fungible, then the settlement brings into effect the rules of purchasing usurped property. Thus, if the settling third party can take the property from the claimed debtor, the settlement is rendered valid, otherwise it is rendered invalid. Moreover, the Shāfi'is ruled that if the settling third party does not disagree with the claimed debtor in his denial of the claim, then the settlement is void and nugatory.<sup>35</sup>

- If the settling third party does not have the claimed debtor's permission to settle, then we need to consider five different cases of this un-commissioned settling agency. In the first four of those cases, the un-commissioned settling party is bound to pay the settlement compensation, and the claimed debtor is absolved of all responsibility thereof. Those four cases are:
  - If the un-commissioned settling party explicitly names himself as the settling party, e.g. "I settle your claim on so-and-so in exchange for \$x".
  - If he names his own property as the settling compensation.
  - If he points to his property as the settling compensation, even if he does not explicitly say that it is his.
  - If he delivers his property as the settling compensation, even if he does not name it as his or point to it.

In those four cases, the settlement is valid, based on the verse: "The believers are but a single brotherhood, so make peace and reconciliation between your two contending brothers" [49:10], as well as the verse "And reconciliation is best" [4:128]. In such cases, the un-commissioned settling agent is thus dealing at his own instance and with his own property to drop another person's debt if the claimed debtor had acknowledged the claim. If the claimed debtor had denied the claim, the un-commissioned settling agent is still viewed to voluntarily give his property to drop charges against another. In either case, his voluntary contribution is permitted.

In one other case, the settlement is deemed invalid, and suspended pending the claimed debtor's approval:

- If the un-commissioned settling agent names the settlement compensation (e.g. \$1000), but does not identify it out of his own property, then he is implicitly settling for that compensation out of the claimed debtor's property.

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<sup>35</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.181), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), *ibid.*, p.333).



In this fifth case, the settlement is executed if the claimed debtor approves it, and he would thus be responsible for the compensation. This ruling follows from the view that by approving the settlement, the agency is validated retroactively, whereby the claimed debtor, and not his agent, would have to pay the compensation. On the other hand, if the claimed debtor does not approve the settlement, then it is invalidated. The latter ruling follows from the fact that dealing on the behalf of another party is only permitted by his permission, and the contract is primarily pertaining to the claimed debtor.<sup>36</sup>

Those rulings apply in the same manner to a third party's conducting of divorce at the instance of the wife:

- If such divorce is authorized by the husband or the wife, then the third party is considered an agent, and the wife is responsible to pay the divorce compensation. The agent is thus not responsible for any payments, since he merely represents the principal, but the rights and responsibilities of the contract continue to pertain to the principal, and are not transferred to the agent.
- If the third party is not authorized to conduct the divorce, but tells the man “divorce your wife in exchange for \$x that I will pay”, or points to his own property as the divorce compensation, then the divorce is valid. In this case, the un-commissioned divorcing agent is considered a voluntary contributor, who must thus pay the divorce compensation and not seek any compensation from the principal wife.
- Finally, if the third party says “divorce your wife in exchange for \$x”, without specifying that the payment will be made out of his property, then the divorce is suspended pending the wife's permission. Thus, if she permits it, the divorce is valid and she must pay the compensation, otherwise the divorce is invalidated.

The same rulings apply equally to third-party settlements of retribution for murder. Similar rulings also apply to third-party increases of a sales price. In the latter case, if the increase is authorized by the buyer, then the third party is considered an agent, and the price increase is binding on the buyer, otherwise we apply the same rules discussed in settlement contracts.<sup>37</sup>

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<sup>36</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.52), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.40), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.40).

<sup>37</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.52).



## Chapter 77

# Legal Status

A settlement contract results in a number of legal consequences, which are:<sup>1</sup>

1. Settlement terminates the settled disputes legally. Thus, all later claims regarding the settled dispute are legally ignored. This ruling is in accordance to the nature of settlement.
2. If the claimed debt is for real estate, and the settlement compensation is monetary or otherwise different from real estate, then preemption (*shuʿa*) rights are established in settlements if the claimed debtor acknowledges the claim's validity. This ruling follows since settlement in this case is in fact a sale, and thus preemption rights must be observed. However, preemption rights do not apply if the claimed debtor denies the claim, since settlement is a means of terminating the dispute, but not a sale.

On the other hand, if the settlement compensation is real estate, and the claimed debtor acknowledges the claim's validity, then preemption rights for the two properties are established. This ruling follows from the fact that settlement in this case is tantamount to a sale.

If the claimed debtor denied the claim's validity, but settled it for another real estate nonetheless, then preemption rights associated with the settlement compensation are established, while preemption rights associated with the real estate claimed as a liability are not. The latter ruling follows from the fact that the claimed real estate is not commutatively exchanged by the claimed debtor through such settlements, meant only to terminate the dispute, and hence preemption rights attached to that property are not observed. In contrast, the settlement compensation real estate is taken by the claimant as part of a commutative exchange, and thus preemption rights in that property must be observed.

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.53), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.29), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.163), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.33), 'Ibn ʿAbidin ((Ḥanafī), vol.4, p.494).



3. Both parties of a settlement in which the claimed debt is acknowledged have an established right of returning defective compensations. This ruling follows from viewing such settlements as being tantamount to sales.

On the other hand, if the claimed debtor denies the claim, then the claimant retains the right to return defective compensation, but the claimed debtor does not have a similar right. This follows from the ruling that settlement in this case is tantamount to a sale from the claimant's point of view, but not from the claimed debtor's.

Those rulings are applied in the case where part of the underlying liability is found to belong to a third party. In this case, the claimed debtor may demand compensation from the claimant for that part of the claimed liability. This ruling follows by analogy to the parallel rulings for sales contracts.

On the other hand, if the claimed debtor denied or failed to acknowledge the claim's validity, and then the property of the underlying liability is demanded by its true owner, then the claimant's must transfer his claim to the true owner of the property and return whatever settlement compensation he had taken.<sup>2</sup> In this case, the claimed debtor only paid that compensation to terminate the dispute. Thus, if the property is found to belong to a third party, the claimed debtor is seen not to be a valid part of that dispute, and thus the settlement compensation must be returned to him. In this regard, if the third party only claimed his rightful ownership of part of the disputed property, then the owner must take back his property, and the claimant must transfer his claim for that portion to him.

4. The inspection option applies to both types of settlements. This ruling follows from the fact that the claimant views the settlement compensation as one side of a commutative exchange of his right, and thus he must be given an inspection option.
5. If the settlement compensation is portable, then it is not permissible to deal in it prior to receipt, regardless of the type of settlement. Thus, the claimant may not sell the portable settlement compensation or give it as a gift, etc. On the other hand, if the settlement compensation is not portable (e.g. real estate), then 'Abū Ḥanīfa and 'Abū Yūsuf ruled that the claimant may deal in it prior to receiving it, while Muḥammad ruled that he may not. The basis for those divergent rulings is the same as the one we discussed in the chapters dealing with sales contracts.

In settlements of retribution rights for murder, the recipient of settlement compensations may trade them or absolve the debtor for them prior to receipt. This ruling is in analogy to the permissibility of trading in dowries

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<sup>2</sup>Ibn Al-Humām ((Ḥanafī), *ibid.*, p.29), Al-Sarakhsī (1st edition (Ḥanafī), vol.20, p.149 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, pp.32,34), <sup>c</sup>Abd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.164).



and compensations for divorce at the instance of the wife prior to receipt. Those rulings all follow from the view that trading prior to receipt is forbidden in certain instances to prevent the contract from being voided if its object were to perish. However, since the right for retribution in murder cannot be voided, there is no need to rule against dealing in the settlement compensation prior to receipt.

6. If the settlement takes a form that is tantamount to being a commutative contract, then a settling agent must be liable for the settlement compensation, and not the claimed debtor. Similarly, if the settlement compensation is of a different genus from the claimed right, the settlement is tantamount to a sale, and all rights and obligation in sales agencies pertain to the agent.

On the other hand, if the settlement is tantamount to debt repayment, then the agent is responsible for the settlement compensation only if he guarantees it. Otherwise, the settling agent is in fact a messenger, to whom the rights and responsibilities of the contract are not attached. In this regard, if the agent guaranteed the compensation, he would thus guarantee it by virtue of the guaranty contract, not the settlement contract.

In summary, as the Shāfi'is said, if the claim is acknowledged by the debtor, and settled for a property other than the claimed liability, then the contract is in fact a sales contract, despite the use of "settlement" language. Thus, the legal rules of sales must apply, including preemption rights, rights to return defective compensations, prohibition of dealing prior to receipt, and mutual receipt if the underlying liability and its settlement compensations are of the same *ribawī* genus.<sup>3</sup>

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<sup>3</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.177), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.333).



## Chapter 78

# Invalid Settlements

### 78.1 Invalidating factors

A settlement may be invalidated by any of the following:<sup>1</sup>

1. With the exception of settlement of the right to physical retribution for murder, voiding the contract would invalidate it. This follows since those other settlements involve exchanging properties for properties, and thus may be voided in analogy to sales and other commutative contracts. In contrast, settlement of the right to physical retribution for murder implies dropping the right for physical retribution, and thus it cannot be voided, in analogy to divorce and other non-voidable contracts.
2. 'Abū Ḥanīfa ruled that settlements conducted by an apostate who dies in that state, or flees to the land of war, are thus invalidated. This ruling is based on this established juristic rule that dealings of apostate individuals are deemed suspended. Then, he ruled that his dealings are executed if he returns to Islam, or invalidated if he dies or joins the land of war and the ruler ordered him to be chased. In contrast, we have seen that 'Abū Yūsuf and Muḥammad ruled that the dealings of an apostate person are executable, and hence they disagree with this ruling of 'Abū Ḥanīfa.
3. If the settlement compensation is returned based on the defect option or the inspection option, then the contract is voided and invalidated.
4. If the claim was settled in exchange for usufruct, then the settlement is voided if either party of the contract dies before the lease expiration date. This follows since settlement in exchange for usufruct is tantamount to a lease contract, which is invalidated by the death of either party. Moreover, if the object whose usufruct was named as the settlement compensation perishes, the settlement is invalidated.

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.54 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, pp.32,34), <sup>c</sup>Abd Al-Gḥanī Al-Maydānī ((Ḥanafī), vol.4, p.494).



## 78.2 Legal status after voiding

If a settlement contract is invalidated and voided, and if the claimed debtor had denied the claim's validity, then the claimant's claim is thus restored. On the other hand, if the claimed debtor acknowledged the claim's validity, then the claimant may demand repayment from that debtor and no other party. In both cases, voiding the settlement thus restores the situation to its original state prior to the settlement contract.

A notable exception again pertains to the case of settlement of the right to physical retribution for murder. Voiding of such a settlement would give the claimant the right to demand financial compensation (*diyyah*), but the right to exact physical retribution is dropped irrevocably.

A second exception pertains to the case of settlements for usufruct that are voided during the lease period. In such cases, the claimant may only demand compensation in proportion to the amount of usufruct that was not extracted under the settlement.<sup>2</sup>

## 78.3 Estate settlements

The jurists recognize a contract by the name of *mukhārajah*, by virtue of which one of the heirs may settle with the rest by dropping his right to a share in the estate for a sum of money that he takes from the estate or otherwise. Jurists consider this contract a valid one, and enforce the rules of sales to all of its consequences. In this regard, the legal status of this contract varies according to whether the estate consists of non-fungible or monetary properties. Thus, if the estate consists primarily of non-fungibles, the settlement is considered a valid sale regardless of the amount of compensation. In this regard, <sup>c</sup>Uṭmān is known to have settled <sup>c</sup>Abdul-Raḥmān ibn <sup>c</sup>Awf's wife's claim to one-thirty-second of his estate in exchange for eighty thousand *Dinārs*.

If the estate consists of gold and silver monies, then the settlement is valid with any size compensation if the compensation is paid in a different genus from that of the estate. In such a contract (e.g. of trading gold for silver), equality is not required, but mutual receipt during the contract session (which is in-fact a currency exchange) is required to avoid *ribā*.

If the estate consists of both non-fungibles and monetary assets, and if the monetary component is larger, then the settlement compensation must exceed the settling heir's share of the estate. By following this rule, his share of the monetary assets can be cancelled against the monetary compensation that he receives, and any increase in his compensation can be matched to the non-fungible components of the estate. Moreover, he must receive the part of the compensation corresponding to his share in the gold and silver component of the estate during the contract session. Thus, *ribā* in the currency exchange part

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<sup>2</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.55 onwards), Al-Sarakhsī (1st edition (Ḥanafī), vol.21, p.34), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.33), 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.4, p.495).



of the settlement may be avoided.<sup>3</sup>

In summary, the Ḥanafīs required the estate underlying a settlement to be known. Moreover, they consider the settlement to be a sales contract, wherein the settlement compensation need not be exactly equal to the heir's share of the estate. In this regard, knowledge of the estate is required to satisfy the condition of knowledge of the object of a sale to avoid *gharar*, while equality of the two compensations is not required since prices need not be equal to the value of sold objects. Finally, if the estate contains gold and silver, immediate receipt of the compensation is required for the corresponding component of the settlement compensation to avoid *ribā*.

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<sup>3</sup>cAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.170), 'Ibn cĀbidīn ((Ḥanafī), vol.7, p.205 onwards).



## Part XII

### Absolution (*Al-'Ibrā'*)



## Preliminaries

We shall study absolution in six chapters:

1. Definition and legality.
2. Cornerstones.
3. Conditions.
4. Objects of absolution.
5. Types of absolution.
6. Legal status.



## Chapter 80

# Absolution Cornerstones

The Ḥanafīs ruled that absolution has a single cornerstone: an explicit and clear offer issued by the absolver to indicate that he has thus dropped his right. They considered this the only cornerstone based on their view that cornerstones are parts of a contract without which the contract cannot exist. Thus, they ruled that the offer is the only part of absolution without which the contract ceases to exist, while all other aspects of the contract (e.g. two parties, object of absolution, etc.) are not considered cornerstones since they are not parts thereof.

In contrast, the non-Ḥanafī jurists enumerated four cornerstones for the absolution contract: (i) the absolving creditor, (ii) the absolved debtor, (iii) the contract language, and (iv) the absolved debt. This enumeration is based on the view that a cornerstone of a contract is any aspect without which the contract ceases to exist, regardless of whether or not it is part of the contract.

### 80.1 Is acceptance necessary?

The non-Mālikī jurists ruled that absolution does not require the absolved debtor's acceptance. Thus, they ruled that the contract is concluded upon the conclusion of the absolution offer. This ruling follows from the fact that the Ḥanafīs and Ḥanbalīs viewed absolution primarily as a dropping of the creditor's rights. Thus, such dropping of a right does not require acceptance, in analogy to divorce and freeing of slaves. In this regard, they did not distinguish between dropping the debt through the language of absolution or the language of giving the debt as a gift to the debtor. While some Ḥanafīs argued that acceptance is necessary if the debt is given as a gift to the debtor, the majority ruled that acceptance is not necessary in this case. Finally, while the Shāfi'īs viewed absolution primarily as a transfer of ownership of the debt to the debtor, they still ruled that acceptance is not necessary, since the objective of the contract is still acknowledged to be dropping the creditor's right.

The offer language can take any form, as long as it clearly indicates dropping



the creditor's right or the transfer of ownership of the debt to the debtor. Indeed, item #1561 of *Al-Majallah* stated: "A creditor absolves his debtor if he declares that he has no claims on him, that he has no rights with him, that he has dropped his claim on him, that he has left whatever the other owes him, or that he has received full repayment from him".

Diverging from the other three schools, most of the Mālikīs ruled that absolution requires acceptance of the absolved debtor. They based this ruling on their view that absolution is primarily a transfer of ownership of the debt to the debtor as a gift, and thus acceptance is required by analogy to other gifts.

All jurists agree that acceptance is permissible during the absolution session, with the Shāfi'īs ruling further that acceptance should be verbal and immediate if he is authorized by the creditor or judge to absolve himself.<sup>1</sup> On the other hand, most of the Mālikīs ruled that it is permissible to defer acceptance of absolution, saying: "Whoever was silent regarding accepting a charity may accept it later".

The Ḥanafīs stipulated that acceptance is necessary in two exceptional cases: absolution for either side of a currency exchange contract, and absolution for the price of *salam*. In both of those special cases, absolution results in non-receipt of a necessary part of the contract, without which the contract would be deemed invalid. Neither party can invalidate the contract alone, and thus, absolution and the resulting voiding of the currency exchange of *salam* contract requires acceptance of the other party. In contrast, absolution for the object of *salam* or the price of sold merchandise is permissible without acceptance of the liable party, since receipt of those items is not a condition of the contract. Thus, the latter cases involve dropping a debt that the creditor is not legally required to receive, and hence he may absolve it unilaterally.<sup>2</sup>

## 80.2 Rejecting absolution

The Shāfi'īs and most Ḥanbalīs ruled that absolution is concluded by offer alone, and cannot be rejected by the debtor. The Ḥanafīs supported this ruling by analogy to other contracts in which rights are dropped, e.g. dropping the right to physical retribution for murder, or the preemption right for real estate. Similarly, the Shāfi'īs ruled that the intent of absolution is to drop the creditor's right, and hence the debt is absolved even if the debtor rejects the absolution.

In contrast, the Ḥanafīs and Mālikīs ruled that absolution can be revoked if the debtor rejects it during or after the absolution session, provided that he had not previously accepted it. The Mālikīs based this ruling on the view that absolution requires the absolved debtor's consent, and that it is primarily a transfer of ownership. While the Ḥanafīs viewed absolution primarily as a dropping of the creditor's right, they also recognized its ownership transfer aspect, which renders the absolution revoked if the debtor rejects it.<sup>3</sup> Those

<sup>1</sup> Al-Qalyūbī ((Shāfi'ī), vol.2, p.340), Al-Suyūṭī ((Shāfi'ī), p.152).

<sup>2</sup> Al-Kāsānī ((Ḥanafī), vol.5, p.203).

<sup>3</sup> Ibn Al-Humām ((Ḥanafī), vol.7, p.44), Indian Authors ((Ḥanafī), vol.4, pp.365,384),



rulings apply to rejection of the absolution by the debtor himself, or by his heir after his death.

However, the Ḥanafīs enumerated four special cases, wherein absolution cannot be revoked by rejection:<sup>4</sup>

1. Absolution in debt transfers (*hawālah*).
2. Absolution in guaranty (*kafalah*), for most Ḥanafīs.

In both of the first two cases, the absolution is a pure dropping of the creditor's right, without any transfer of ownership. In this regard, a pure dropping of one's right cannot be revoked since the right ceases to exist as soon as it is dropped. Thus, if the creditor absolves a debt transferee, the latter cannot revoke the absolution. Similarly, the guarantor cannot revoke the creditor's absolution of the debt.

3. If the absolved debtor asked for the absolution, and it was granted by the creditor, then the debtor may not later revoke the absolution by rejecting it.
4. If the absolved debtor accepted the absolution at some point in time, then he may not later revoke it by rejection.

In item #1568 of *Al-Majallah*, the following Ḥanafī rulings regarding acceptance and revocation were listed: "Absolution is not suspended pending acceptance, but it may be revoked if the debtor rejects it. Thus, the absolution is concluded by the offer, but if the debtor rejects it, then the contract is voided and considered non-existent. However, the absolution is not voided if the debtor first accepted it and then tried to reject it. Moreover, absolution cannot be revoked in the cases of debt transfers and guaranty".

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<sup>1</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.544), Al-Suyūṭī ((Shāfiʿī), p.152), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.336), Al-Dardīr ((Mālikī)A, vol.4, p.99).

<sup>4</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.544).



## Chapter 81

# Absolution Conditions

The absolution contract conditions may pertain to the absolving creditor, the absolved debtor, the language of absolution, or the absolved debt. In what follows, we shall discuss each set of conditions in some detail.

### 81.1 Absolving creditor conditions

The absolving creditor must satisfy the following conditions:<sup>1</sup>

1. He must be eligible to engage in pure contribution contracts. Thus, he must be sane, of legal age, and discerning, without any legal constraints on his dealings based on mental incompetence or excessive indebtedness. This ruling follows from the fact that absolution is a voluntary contribution of the absolver, for which he receives no compensation from the absolved debtor. The condition that the absolving creditor must not be under legal restraint based on excessive indebtedness is an executability condition for 'Abū Yūsuf and Muḥammad, who allow such legal restraint. Thus, they ruled that absolutions by such legally restrained debtors is valid, but suspended pending the consent of his creditors, to protect their rights.
2. The absolving party must either own the right that he drops thus, or he must be an agent or plenipotentiary for the creditor. In this regard, the rulings for regular agency in this case apply to un-commissioned agencies for those who recognize the dealings of un-commissioned agents.

The Ḥanafīs and Ḥanbalīs ruled that rulings for absolutions conducted by plenipotentiaries or guardians depend on the factual state of affairs, rather than the beliefs of acting agents. Thus, the absolution is valid if a man absolved a debtor for a debt that he owed his father, thinking that

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<sup>1</sup>Tbn ʿĀbidīn ((Ḥanafī), vol.4, p.531; vol.2, p.328), Indian Authors ((Ḥanafī), vol.4, p.355), *Murshid Al-Ḥayrān* (#s 184,185,197,198), Al-Dardīr ((Mālikī)A, vol.4, p.98), Al-Qalyūbī ((Shāfiʿī), vol.2, p.326; vol.3, pp.159,162), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, pp.329,336), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.202), Al-Suyūṭī ((Shāfiʿī), p.152).



the latter was alive at the time, but later discovered that his father was in fact dead at the time of absolution. This ruling follows from the fact that the absolved debt thus was owned by the absolving party at the time, and the absolution is a dropping of his right to that debt. However, for the majority of Shāfi'īs who view absolution primarily as a transfer of ownership, this type of absolution is deemed invalid.

3. The absolving party must be acting voluntarily of his own volition. Thus, absolutions by coerced creditors are deemed invalid.

### 81.1.1 Absolution agency

Agency to conduct an absolution is valid, provided that the principal authorizes the agent specifically to engage in that transaction. Thus, an agent who is authorized for other contracts is not implicitly authorized to absolve the principal's debtors. Moreover, the Ḥanafīs do not allow an agent who is authorized to absolve debtors to appoint a secondary absolution agent.

The Shāfi'īs ruled that an absolution agency is valid if the principal knows of the size of the absolved debt, even if the agent and the debtor do not know its size.<sup>2</sup> Since most Shāfi'īs viewed absolution primarily as a transfer of ownership, they do not allow the creditor to appoint the debtor as an absolution agent for himself. They based this ruling on analogy to the impermissibility of appointing an agent to buy from himself. However, a minority of the Shāfi'īs permitted appointing the debtor as his own absolution agent, on the basis of viewing absolution primarily as a dropping of the creditor's right.

### 81.1.2 Absolution by a dying creditor

The first condition implies that the absolving party cannot be terminally ill. Thus, if a terminally ill creditor absolves one of his heirs of a debt, the absolution is deemed suspended pending the permission of the other heirs, even if the absolved debt was smaller than one-third of the ill creditor's estate. If a terminally ill creditor absolves the debt of a non-heir, then the absolution of any portion of that debt exceeding one-thirds the dying creditor's estate is suspended pending the approval of his heirs. Those rulings follow since absolution is a voluntary contribution contract that has to obey the rules of inheritance if the absolving party is dying. Moreover, if the terminally ill person absolves a debtor, while his own estate is less than the sum of his debts, the absolution is not executed, to protect the rights of the dying person's creditors.<sup>3</sup>

<sup>2</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.222), Al-Suyūṭī ((Shāfi'ī), p.152).

<sup>3</sup>Indian Authors ((Ḥanafī), [vol.4, p.382], 'Ibn Al-Humām ((Ḥanafī), vol.6, p.281; vol.7, p.23), Al-Qalyūbī ((Shāfi'ī), vol.3, pp.159,162), Al-Suyūṭī ((Shāfi'ī), p.152), *Al-Majallah Adliyyah* (items # 1570,1571), Al-Dardīr ((Mālikī)A, vol.4, p.98).



## 81.2 Absolved debtor conditions

The Ḥanbalī jurists agree that the absolved debtor must be known and identified.<sup>4</sup> Thus, if a creditor absolves “one of his debtors”, without specifying which one, the absolution is rendered invalid. Similarly, they ruled that the absolution is invalid if the creditor says: “I have absolved all of my debtors”, unless he means a specific set of debtors or identifies them.

The Shāfi‘ī is also invalidated absolutions in which the absolved debtors are not known or properly identified. They based this ruling on the view that absolution involves a transfer of ownership, which is not permissible if the transferee is unknown. Thus, the absolved debtor, to whom ownership is transferred, must be known, whereas the absolving creditor merely drops his right, and thus need not be known.

*Al-Majallah* summarized this condition (item #1567) as follows: “The absolved parties must be known and identified. Thus, if someone says: ‘I have absolved all of my debtors’, or ‘nobody owes me anything anymore’, the absolution is not valid. However, if he says: ‘I have absolved the residents of this location’, where those residents are thus an identified set of individuals, then the absolution is valid”.

The absolved debtor’s denial of the absolved debt does not affect the validity of the absolution, even if the debtor were to back his denial with an oath. This ruling follows from the fact that the non-Mālikī jurists consider absolution concluded by the offer alone, regardless of acceptance of the contract or the absolved debt by the absolved debtor.

## 81.3 Absolved debt conditions

The absolved debt must satisfy the following conditions:<sup>5</sup>

1. The latter Shāfi‘ī doctrine stipulates that the absolved debt must be known. Thus, it is not valid to absolve debts that are unknown in genus, amount, or characteristics, where attaining knowledge thereof is difficult. This ruling follows from the view that absolution is a transfer of ownership, which thus requires consent. In this regard, ignorance of the object of the contract negates the possibility of consent. On the other hand, if a person “absolves another of the silver coins he owes him”, without knowing the size of the debt, the debtor is thus absolved of his liability of three coins, which is the smallest amount for which the Arabic plural form can be used.

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<sup>4</sup> *Jāmi‘ Al-Fuṣūliyyīn* (Al-‘Azhariyyah edition, 1300 A.H., vol.1, p.125), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.99), Al-Suyūṭī ((Shāfi‘ī), p.152), Al-Buhūṭī (3rd printing (Ḥanbalī), vol.4, p.337).

<sup>5</sup> Ibn ‘Ābidīn ((Ḥanafī), vol.2, pp.182-3), Al-Dardīr ((Mālikī)A, vol.3, p.411), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.202 onwards), Al-Qalyūbī ((Shāfi‘ī), vol.2, p.326 onwards), Al-Buhūṭī (3rd printing (Ḥanbalī), vol.4, p.336).



On the other hand, they said that absolution of unknown debt may be accomplished by absolving the debtor for an amount known to exceed the size of the debt. Thus, if the creditor wishes to absolve his debtor, but does not know whether he owes him \$5 or \$10, he may absolve him of his debt for \$15, thus making sure that the debtor is absolved.

Moreover, they stipulated two exceptions to the prohibition of absolving unknown debts. The first is absolution from a liability for a certain number of camels in retribution for killing a relative. In this case, the liability is unknown in terms of the camels' characteristics, even though their ages and number is known. In this case, the absolution is deemed valid, and the characteristics of the camels of the absolved liability are deemed to be the average characteristics in the relevant part of the world. As a second exception, they allowed absolution of unknown debts upon the creditor's death, since that can be viewed in fact as part of the creditor's will.

The Ḥanafīs, Mālikīs, and Ḥanbalīs disagreed with the Shāfi'īs, and allowed absolution of liabilities for goods that are unknown in amount and characteristics, even if it is not difficult to get that information. They based this ruling on the view that absolution is primarily a dropping of the creditor's right without compensation (in analogy to divorce and freeing of slaves), and thus it can be executed whether or not the object of contract is known. Thus, they consider the absolution valid if a creditor to "absolve his debtor of one of his two debts", without specifying which one.

However, the Ḥanbalīs stipulated an exception to this rule if the debtor intentionally withholds information regarding the size of his debt, for fear that the creditor may not absolve him if he has that information. In this case, they ruled that the absolution is not valid, since it involves unnecessary deception of the absolving creditor.

2. The absolved debt must be fungible. This ruling follows from the fact that non-fungibles cannot be established as liabilities, and absolution is a dropping of established liabilities. Thus, if a person usurps a particular book, absolution from this usurpation is not valid. In contrast, liabilities for fungibles or vaguely specified non-fungibles (e.g. camels as retribution for a killing) are valid. Moreover, absolutions from legal rights, such as the right to level a charge, or the right to demand repayment from a guarantor or debt-transferee, are valid.
3. The object of absolution must exist at the time of absolution. Thus, absolution from a right prior to its establishment is invalid. For instance, absolving a man from a future debt is not permissible. Consequently, the Ḥanafīs did not allow a wife to absolve her husband from future spending on her needs, or from alimony expenses if he were to divorce her in the future. This condition follows from the fact that absolution is a dropping of a right, and a right cannot be dropped if it is not established. Proof for this condition was also provided by the Ḥadīth: "You cannot divorce



someone to whom you are not married, and you cannot free a slave that you do not own”.<sup>6</sup> Clearly, absolution is similar to those contracts in terms of its characterization as a pure dropping of rights.

## 81.4 Absolution language conditions

The absolution contract and its language must satisfy four conditions:<sup>7</sup>

1. The non-Mālikīs ruled that absolution must be immediately executed, i.e. it cannot be suspended pending a condition, or deferred to a future date. They based this ruling on the view that absolution implies a transfer of ownership, which transfer cannot be suspended pending a condition.
  - Thus, if the contract language suspends absolution pending a condition that is in fact satisfied at the time of absolution, the contract is thus executed. Jurists also agreed that the contract is permissible if absolution is suspended pending an admissible condition (e.g. “if you owe me, then you are absolved”, or “if I die, then you are absolved”). They provided proof for the latter ruling by the statement of the Prophet’s companion ‘Abū Al-Yusr (mAbpwh) to his debtor: “If you can pay your debt, then pay it, otherwise you are absolved”, and his action was not criticized. Thus, the Ḥanafīs allow in absolution of guaranty or debt transfer that the absolving creditor may say: “If you repay me tomorrow, then you are absolved of your guaranty”, whereby the guarantor is absolved if he does bring the repayment on the following day.
  - In this regard, the Ḥanafīs and Ḥanbalīs permitted absolution to be suspended pending the creditor’s death, since absolution in this case is tantamount to being part of the will. In this regard, inclusion of absolution of debt in a person’s will is permissible. On the other hand, most Ḥanafīs, with few exceptions, did not permit absolution pending other types of conditions merely because they are conventional.
  - The non-Mālikīs ruled that it is not permissible to suspend absolution pending any conditions other than the ones mentioned above. They based this ruling on the view that absolution implies a transfer of

<sup>6</sup>This is a Ḥadīth Ḥasan, narrated by ‘Abū Dāwūd, and Al-Ḥākim. It was also narrated by ‘Ibn Mājah on the authority of Al-Musawwar as: “There is no divorce before marriage, and no freeing of a slave prior to owning him”.

<sup>7</sup>‘Ibn Al-Humām ((Ḥanafī), vol.7, pp.41,44 onwards), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.176; vol.2, p.330), Indian Authors ((Ḥanafī), vol.4, pp.378,384), Al-Kāsānī ((Ḥanafī), vol.6, pp.45,50,118), Al-Dardīr ((Mālikī)A, vol.2, p.307; vol.4, pp.89,99,100), Al-Shaykh ‘Elish ((Mālikī), vol.1, pp.229,322,335), Al-Suyūṭī ((Shāfi‘ī), p.152), ‘Abū-‘Ishāq Al-Shirāzī ((Shāfi‘ī), vol.10, p.100), Al-Qalyūbī ((Shāfi‘ī), vol.2, p.292; vol.3, pp.45,83,310; vol.4, p.368), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.305; vol.4, p.337), ‘Ibn Qudāmah (, vol.4, p.483 onwards; vol.5, p.564), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.66).



property, which transfer cannot be suspended. However, as we have seen, suspension pending a condition is permissible for contracts that involve a pure dropping of a person's right, with no compensation.

- In contrast, the Mālikīs allow suspension of absolution pending a condition in all cases. They based this ruling on the view of absolution as a dropping of the creditor's right.

On the other hand, all four schools of jurisprudence agreed that it is permissible to tie absolution to a valid condition, and did not permit tying it to an invalid condition. Thus, if the creditor absolves the debtor on condition that he has an option, the absolution is deemed valid, and the condition is invalidated. Similarly, if the creditor absolves the debtor of all rights associated with him, that absolution would include the rights associated with options. In this case, the absolution is valid, while the invalid condition of dropping the option is invalidated. This ruling follows from the fact that absolution, while it implies a transfer of ownership, is weaker in this respect than gift contracts.

Jurists also agreed that it is invalid to defer absolution to any future date (known or unknown) other than a time of death. This ruling follows from the view that the default in absolution is immediate execution of the transfer of ownership, which generally cannot be deferred to a future date.

Finally, we consider a partial absolution, in which the debtor is still required to repay part of the debt:

- All jurists agree that if the language of partial absolution is devoid of any conditions, then the absolution is valid. Thus, the creditor may say to the debtor: "I absolve you of one-half of your debt to me, so pay me the other half". This contract is thus executed immediately, since it is neither suspended pending a condition nor deferred to a future date. Indeed, the absolving creditor in this case voluntarily drops part of his right, and is acting in accordance with the Ḥadīth in which the Prophet (pbuh) told Ka'b: "Drop part of the debt he owes you".<sup>8</sup>
- If the absolution is suspended pending payment of the other part of the debt, then the Mālikīs deem the absolution valid, while the non-Mālikīs consider it invalid. Those rulings follow from the previous views reviewed under the suspension clause.
- If the absolution is tied to the condition of repayment of the other part of the debt (e.g. "I absolve you of \$500, on condition that you must pay me the other \$500"), then the Ḥanafīs, Mālikīs, and Shāfi'īs deem the absolution valid. They ruled thus based on the view that the contract is in fact a demand for recollection of part of the debt, and a dropping of the other part. In this case, the Shāfi'īs

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<sup>8</sup>Narrated by Al-Bukhārī and Muslim on the authority of Ziyād ibn 'Abī Ḥadrad.



required the creditor to use both the language of absolution and the language of settlement, to justify the settlement aspect of this contract. However, they maintained that acceptance of the debtor is not required in this case, due to the usage of absolution language.

In contrast, the Ḥanbalīs ruled that absolutions tied to conditions are not valid. They ruled thus since they viewed the previous example as an absolution of part of the debt in exchange for payment of the other part. It would thus seem to be a commutative contract in which part of the right is traded for another part, which they deemed impermissible.

Of course, the above difference in opinion pertains to tying the partial absolution to the condition of eventual payment of the other part of the debt. However, as the Shāfiʿīs showed, it is not permissible to tie partial absolution to a condition that the other part is paid immediately, to avoid similarity with pre-Islamic forms of *ribā*. However, it is permissible in the first case for the debtor in fact to repay the other part of the debt immediately, as long as speeding up its payment was not stipulated as a condition for the partial absolution.

2. Absolution should not violate any Legal requirement. For instance, absolution of the condition of mutual receipt during a currency exchange contract defies Islamic Law, and is thus invalid. Other invalid examples include absolution from the woman's right to a dwelling during her waiting period after divorce (*ʿiddah*), or absolution of the obligation to act as a small child's guardian.

Moreover, absolution is rendered invalid if it affects adversely the rights of a third party. For instance, if a divorced mother absolves the husband of her custody rights, the absolution is deemed invalid, since custody rights pertain both to the child and his custodian.

3. The absolving creditor must have a prior right to the object of absolution. This condition follows from the fact that dealing in the property of others is not permitted except as an agent acting as a proxy for the owner. In this regard, even the jurists who permit un-commissioned agent dealings permit them thus if he acts in the guise of an owner, otherwise they would have forbidden them as dealing in the property of another. Thus, all jurists agree on this third condition.

In addition, the Ḥanafīs considered as valid the absolution of rights after they are dropped or debts after they are repaid. They based this ruling on the view that what is dropped through debt repayment is the right to demand repayment, and not the debt itself. In other words, debt repayment establishes an equal debt on the creditor, and the two debts cancel each other out in terms of the respective parties' rights to demand compensations from each other. However, the two debts are cancelled out through the clearing of debts (*muqāṣṣah*) rather than the mere act of repayment.



Thus, if the creditor absolves the debtor after he had repaid his debt as a dropping absolution, then the debtor may thus demand to recollect what he gave him. On the other hand, the debtor has no such right if the creditor issued a repayment absolution. In this regard, the type of absolution (dropping vs. repayment) is determined by convention. Thus, the Ḥanafīs and Ḥanbalīs agree that if one person volunteers to repay the debt of another, and then the creditor concludes a dropping absolution of the debt, the volunteer may demand to recollect what he paid the absolving creditor.<sup>9</sup>

4. Absolution must take place after the underlying right is established. This follows from the fact that absolution essentially involves dropping an established liability. Thus, jurists have agreed that absolutions prior to the establishment of the underlying rights are invalid. Such dropping of rights is impossible prior to the establishment of those rights, and thus the absolution is merely a non-binding promise.

If the absolution is issued prior to the establishment of the right, jurists differ on its status after the right is established. The non-Mālikīs ruled that the absolution is invalid unless it is issued after the establishment of the underlying right. As proof, they relied on the previously cited Ḥadīth: “There is no divorce prior to marriage, and no freeing of a slave prior to owning it”, thus reasoning that absolution is similar to those two instances of dropping rights mentioned in the Ḥadīth.

The Ḥanafīs thus provided examples of invalid absolutions based on the violation of this condition. Those include absolving a husband from his liability for his wife’s expenses before they are estimated, and absolution of the buyer from the price of what he has not yet bought.

The Shāfi‘īs also gave examples of such premature absolutions. For instance, they listed the case of a woman’s absolution of her dowry if her husband died prior to consummating the marriage, and whose marriage dissolution compensation was not determined. They also gave the example of invalid absolution from alimony payments prior to divorce. In both cases, the liability underlying the absolution was not established prior to absolution.

Another example that they provided pertains to the case where a buyer absolves the seller of his guaranty of the merchandise against perishing prior to its receipt. In this case, the guaranty was non-existent prior to absolution, and hence the absolution is invalidated.

However, they also listed some exceptional cases in which premature absolution can be valid. One such exception is the case of a man who digs a well in another person’s property, and without the owner’s permission. In this case, if the land’s owner absolves him of his transgression and agrees

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<sup>9</sup>Ibn Rajab (1st edition (Ḥanbalī), p.120).



to keep the well, the unauthorized digger of the well is absolved of his responsibility for individuals or animals that may fall in it.

On the other hand, the Mālikīs had two reported opinions regarding the validity of absolution prior to the establishment of the underlying liability. Thus, the majority ruled that a woman's absolution of a future husband of his responsibility for her future expenses is binding on her. On the other hand, they divided equally on the bindingness of the dropping of a preemption right prior to the sale. They also divided somewhat equally over the absolution for future wounds, and absolution by future heirs of rights to the estate of a terminally ill person to another future heir or a third party for more than one third of the estate.



## Chapter 82

# Objects of Absolution

The object of an absolution may be a non-fungible property, a fungible property, or a legal right. In what follows, we shall study the three cases in some detail.<sup>1</sup>

### 82.1 Non-fungible properties

Absolutions may pertain to the right to demand recollection of a non-fungible property, or they may pertain to the non-fungible property itself. The former is in fact an absolution pertaining to a legal right, and we shall see later in this chapter that all jurists consider it a valid dropping of a legal right. In this section, we are mainly concerned with the latter case of absolutions pertaining to the non-fungible property itself.

Jurists agree that absolution regarding the non-fungible property itself is invalid, since it would imply dropping the ownership of that non-fungible property. We have seen previously that such ownership rights of non-fungibles cannot be dropped. Thus, the absolution is invalid, and ownership of the non-fungible is not transferred to the absolved debtor. Thus, the owner may recall the non-fungible property, even if he had absolved its holder for the item itself.

Thus, the majority of Ḥanafīs, Shāfiʿīs, and Ḥanbalīs ruled that a general absolution of liability for a non-fungible is understood to mean dropping the right to demand its return to the owner. However, some Ḥanafī books maintained that the owner retains the right to take his non-fungible property after the absolution if he has an opportunity to do so.

The Ḥanafīs further ruled that absolution of liability for a non-fungible itself results in dropping its guaranty if it is guaranteed (e.g. due to being usurped), regardless of whether or not the property had perished at the time of absolution. Thus, absolution renders the previously guaranteed property to be held in a possession of trust, in analogy to a deposit in the possession of a usurper. Thus, if the property was intact at the time of absolution, its holder would only

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<sup>1</sup>ʿIbn ʿĀbidīn ((Ḥanafī), vol.2, p.182 onwards; vol.4, p.495), Al-Dardīr ((Mālikī)A, vol.3, p.411), Al-Qalyūbī ((Shāfiʿī), vol.2, p.327), ʿIbn Rajab (1st edition (Ḥanbalī), p.119 onwards).



guarantee it against transgression and negligence. On the other hand, if it had perished prior to absolution, then its holder is absolved of his liability for its value. On the other hand, absolution for non-fungible properties that were in a possession of trust is meaningless. In the latter case, the absolution is still recognized legally, but has no consequences since the owner of the property may still take it after the absolution if the opportunity should arise.

In contrast, the Mālikīs interpreted absolution of liability for a non-fungible property as dropping the right of demanding compensation for its value if it perishes in the possession of the absolved party, as well as dropping the right to demand its return when it is intact.

## 82.2 Fungible debts

As we have seen, jurists agree that absolutions of established liabilities for fungible debts are valid. This ruling follows immediately from the stated maxim that the essence of absolution is the dropping of established liabilities.

## 82.3 Absolution of legal rights

There are three types of legal rights to consider in this section:

- Jurists agree that absolutions of legal rights that pertain only to humans (e.g. arising from guaranty or debt-transfer) are valid.
- Jurists agree that absolutions are invalid for rights that belong only to Allāh, e.g. punishment rights for adultery, libel, and theft (for the Ḥanafīs and Mālikīs those rights are established after guilt is established in a court of law).
- Absolutions in lieu of most rights that pertain primarily to humans are deemed valid. Examples include rights of retribution for killing or murder, rights to usufruct, rights to void a sale based on the defect option, rights to collect compensation for the destruction of one's property, and similar personal rights that are established as liabilities on others. Thus, jurists agreed that it is permissible to absolve a debtor after his death. However, the Ḥanafīs differed in opinion regarding voiding the absolution if the debtor's heir rejects the absolution.

On the other hand, the Ḥanafīs ruled that absolutions are deemed invalid if they result in overruling Legal clauses. Thus, they ruled in opposition to the other schools that the right of recalling a gift cannot be absolved. However, all jurists agree that the right to change one's will cannot be absolved, the right associated with the inspection option cannot be absolved, entitlement rights to property in a trust cannot be absolved, and the right to inheritance cannot be absolved.

In what follows, we shall study some special cases for which absolution rulings are somewhat special.



### 82.3.1 Absolution of alimony

Jurists agree that a wife or soon-to-be-wife may not absolve her husband of her alimony expenses until they are established as a liability on him. This ruling follows from the previously stated condition that absolution requires the prior establishment of a liability.

However, if an invalid premature absolution of future alimony is concluded, then the Ḥanafīs ruled that the future alimony thus does not become a liability on the ex-husband unless it is enforced by a court of law, or by mutual consent. Moreover, they ruled that absolution of suspended previously established alimony may be absolved. Moreover, absolution of alimony for any time period may be absolved at the beginning of that period (depending on whether the alimony is established annually, monthly, or daily).

### 82.3.2 Mutual absolution of spouses

A husband and wife may mutually absolve each other of all marriage rights to dissolve the marriage. The Ḥanafīs ruled that such mutual absolution results in an irrevocable divorce of the wife, in analogy to divorce at the instance of the wife in exchange for financial compensation (*khulʿ*). Thus, the husband may say: “I offer that we mutually absolve each other of all marriage responsibility, in exchange for \$1000”. Then, if the wife accepts, the marriage is dissolved and counted as a divorce.

### 82.3.3 Absolution of the right to level a charge

There are two types of absolution of rights to level a charge against another:

- Jurists agreed that absolutions of the right to level any charge against a person are invalid. They based this ruling on the fact that such absolution refers to charges for which no basis existed at the time of absolution. As we have seen, absolution of rights prior to their establishment is considered invalid.

However, jurists allow a person to absolve another of all existing charges.<sup>2</sup>

- Jurists agree that absolution of any given charge is deemed valid. Thus, the absolver’s charge is not considered were he to level it after having absolved it.<sup>3</sup>

Moreover, absolution of a right may be made explicit, or it may be implicitly inferred from the context. For instance, we have seen that the Ḥanafīs consider an absolution of liability for a non-fungible property to be implicitly understood as absolution of its guaranty, or absolution of the right to demand its return to the owner.

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<sup>2</sup> *Al-Majallah* (item # 1565).

<sup>3</sup> *Al-Majallah* (item # 1564).



## Chapter 83

# Absolution Types

Absolutions may be divided along three different directions pertaining to: (i) their varying degrees of generality, (ii) the timing of their consequences, and (iii) languages of dropping vs. languages of repayment.

### 83.1 Generality of absolutions

Absolutions may be general or specific:<sup>1</sup>

- General absolutions pertain to all liabilities for fungibles, non-fungibles and rights that are owed by one party to another. As the Ḥanafīs pointed out, such general absolutions cover all rights, including non-monetary ones such as liability for a person in guaranties of individuals, the right to physical retribution for murder, the penalty for libel. Of course, they also cover monetary rights as in absolutions of liabilities for prices, wages, and rents. Finally, they cover non-monetary compensations in commutative contracts such as dowry, compensation for transgression against life and limb, as well as guaranteed properties such as usurped ones, and properties in possessions of trust such as deposits and simple loans.
- Specific absolutions pertain to a specific right. Such specific absolutions are restricted to the underlying rights, and do not extend beyond them. Thus, a person may absolve another of a specific debt, or all his debts to a specific party. Similarly, a person may be absolved for a house, other non-fungible properties, or a trust.

### 83.2 Absolution timing

Absolutions can only affect rights and liabilities that existed prior to its conclusion, and cannot extend to rights and liabilities that ensue afterwards. This

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<sup>1</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.495).



follows from the agreed upon condition of absolution validity that the underlying right must exist prior to the contract. Thus, it was stated in the *Fatāwā* of Qāḍikhān that: “Earlier absolution do not affect later debts”.

However, jurists differed in opinion regarding the effects of prior absolutions once their underlying right comes into existence. Thus, ‘Abū Ḥanīfa and Mālik ruled that a prior absolution of a buyer for part of a price becomes appended to the sales contract. Thus, if a person had a preemption right to the sold property, he can benefit by that decrease in its price caused by the partial absolution. On the other hand, the Ḥanbalis and Shāfi‘is ruled that the preemption becomes valid after the sale comes into place. However, they ruled that only the buyer can benefit from such a reduction in price, and a person with preemption rights has either to pay the full price or to allow the sale to be executed.<sup>2</sup>

### 83.3 Dropping vs. repayment absolutions

The Ḥanafis classified absolution contract languages into those that imply a dropping absolution, and those that imply a repayment absolution.<sup>3</sup>

- Dropping absolutions cause the established liability to be dropped. The language of such absolutions often uses the terms for “dropping” or “reducing” the underlying liability, which may be absolved fully or partially.
- Repayment absolutions are basically an acknowledgement for having received a repayment of the underlying debt. It only implies that the repaid creditor is not allowed to demand repayment thereafter. The language of such absolutions often uses the terms for “receipt” or “repayment”.

The difference between those two types of absolutions becomes apparent when we consider the right to seek compensation from the absolving creditor. Thus, jurists agree that if the debtor had repaid his debt, then he can seek compensation if the debt is latter absolved in a dropping absolution, but not if it is absolved through a repayment absolution. Consequently, if a man suspends divorcing his wife pending her absolution of her dowry, and then he pays the dowry anyway, the suspension is not thus voided. Only if the wife issues a dropping absolution will she be divorced, and only then will the husband be entitled to seek compensation for his paid dowry.

Moreover, only dropping absolutions result in the dropping of debts, while repayment absolutions do not. Also, dropping absolutions are invalid in liabilities for non-fungibles, since their ownership cannot be dropped. In contrast, repayment absolution can apply to liabilities for fungibles or non-fungibles, since repayment can take place for both types by delivering the owner’s property to him.

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<sup>2</sup>Ibn Al-Humām ((Ḥanafī), vol.5, p.271), Al-Dardīr ((Mālikī)A, vol.3, p.495), ‘Ibn Qudāmāh (, vol.5, p.323).

<sup>3</sup>Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.176).



## Chapter 84

# Legal Status

If an absolution is concluded satisfying all of its conditions, then the underlying right is dropped. If that underlying right was specific, then the absolver would thus have no right to renew his charge regarding that right. If the underlying right is general, covering all existing rights at its inception, then its effects do not extend to rights that ensue after the contract's conclusion.

The Ḥanafīs, Ḥanbalīs, and most of the Shāfi'īs ruled that an absolver cannot withdraw his absolution after it is concluded. This ruling applies by analogy to the impermissibility of withdrawing a gift after its ownership is transferred to the recipient.<sup>1</sup> Since the Mālikīs require acceptance as a validity condition in absolution, they ruled that the absolver is not allowed to withdraw his absolution after the absolved party accepts it, also by analogy to the ruling for gifts.<sup>2</sup>

The Ḥanafīs listed some special circumstances in which an absolver may renew his charge after the absolution:<sup>3</sup>

1. If sold property is discovered to have been owned by a party other than the seller, then the buyer or the original owner may demand the seller's guaranty of the merchandise, even if he had absolved him after the sale and prior to discovering the true owner.
2. If a previously unknown right of an underage person is discovered, then he may level a charge against his plenipotentiary upon its discovery, even if he had absolved him of all responsibilities after reaching legal age and prior to discovering that right.
3. A plenipotentiary may seek repayment of a debt owed to the deceased, even if he had previously issued a general absolution for all debts owed to him.

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<sup>1</sup> 'Ibn ʿĀbidīn ((Ḥanafī), vol.2, p.182), Al-Suyūṭī ((Shāfi'ī), p.152), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.346).

<sup>2</sup> Al-Qarāfi ((Mālikī), vol.2, p.111).

<sup>3</sup> *Tanbīh Dhawī Al-'Afhām* by 'Ibn ʿĀbidīn (vol.2, p.91).



4. An heir may seek repayment of a debt owed to the deceased, even if he had previously issued a general absolution for all debts owed to him.

In all of those instances, new information is revealed, which thus authorizes the issuer of a general absolution to level a charge nonetheless.

Note that the Ḥanafīs view the dropping of a creditor's right to demand repayment of a debt upon absolution to pertain only to the claim, but not to the actual right to take possession of the property. Thus, if the creditor has an opportunity to regain possession of the property after absolving its holder, he may take it.<sup>4</sup>

The Shāfi'īs ruled that absolution of obligations in this world implies absolution of all responsibility in the hereafter.<sup>5</sup> The Mālikīs had two opinions on this matter, with most of them agreeing with the Shāfi'ī view that Allāh will not punish anyone for a right that he denied but was absolved for by his creditor.<sup>6</sup>

## 84.1 Charges after general absolution

We have seen that charges leveled after an absolution are legally ignored. However, the Ḥanafīs explained this ruling by saying that charges are ignored after general absolutions of debts, except for debts that ensued after the absolution.

If the absolution was regarding a non-fungible, then the claimant's charge is ignored if the claimed debtor denied the claim's validity. However, if the claimed debtor admitted the claim's validity, then the charge can be legally considered even after its liability is absolved. Finally, if the claim is acknowledged, but the non-fungible had perished, then the absolution implies that its guaranty was dropped, and charges thereof are therefore ignored.

In this regard, the Ḥanafīs and Mālikīs ruled that acknowledgement of a claim is ignored if it is issued after a general absolution. This ruling follows from the fact that the debt is thus dropped by virtue of the absolution, and dropped debts may not be reinstated through acknowledgement or otherwise.<sup>7</sup>

## 84.2 Compensated absolution

The Ḥanafīs defined compensated absolution as a settlement in exchange for some property.<sup>8</sup> The Shāfi'īs permitted such compensated absolutions.<sup>9</sup> Thus, if the debtor gives some property to his creditor to absolve him of his debt, the creditor would thus own the property he received, and the debtor is thus absolved. However, if the debtor pays him part of the debt on condition that he absolves him of the rest, the payment would not be viewed as a compensation

<sup>4</sup>Ibn 'Ābidīn ((Ḥanafī), vol.4, p.495; vol.2, p.182).

<sup>5</sup>Al-Qalyūbī ((Shāfi'ī), vol.2, p.327).

<sup>6</sup>Al-Dardīr ((Mālikī)A, vol.3, p.411).

<sup>7</sup>'*lām Al-'A' lām* by 'Ibn 'Ābidīn (vol.2, p.101), Al-Dardīr ((Mālikī)A, vol.3, p.411).

<sup>8</sup>Ibn 'Ābidīn ((Ḥanafī), vol.4, p.495).

<sup>9</sup>*Ḥāshiyat Al-Jamal 'alā Sharḥ Al-Manhaj*, 'Iḥyā' Al-Turāth edition, (vol.3, p.381).



since the creditor would thus have received part of his right and the rest of the debt remains a liability on the debtor. In the latter case, the non-Mālikīs consider the absolution to be invalid, as we have seen in the contract language conditions section.



## Part XIII

### Entitlement (*Al-'Istihqāq*)



## Preliminaries

We shall study entitlements in three chapters:

1. Definition and legal consequences.
2. The effects of entitlement in a set of contracts: sales, barter, pawning, division of joint property, settlement, leasing, crop sharing, marriage (with regards to divorce compensations paid by either party), will, and mortmain.
3. The legal status of entitlements to animals sacrificed on the day of pilgrimage.



## Chapter 85

# Definition and Consequences

### 85.1 definition

Entitlement (*'istihqāq*) refers lexically to demanding the return of the entitled party's right. For instance, a buyer is entitled to the merchandise once he pays its price.

Juristically, the term refers to discovering that a property belongs to another party. In other words, entitlement takes place when a person claims ownership of a property, and a judge rules that he is indeed entitled to it based on the proofs he provides. Consequently, the entitled party may take his property from its possessor. In this regard, the Mālikīs defined entitlement thus: "It is the voiding of ownership of a property, due to the establishment of a prior ownership right".

### 85.2 Legal Consequences

Entitlements may be divided into two main categories based on the resulting voiding of ownership:<sup>1</sup>

1. Entitlements that void all ownership of the property, so that no party maintains ownership rights after the entitlement. Thus, the property after such entitlement has the same properties as free or freed humans.

This type of entitlement voids a contract without the need for a court ruling. Thus, if a sold slaves can prove that he was free or previously freed, then everyone in his chain of buyers may demand compensation for his price from the respective seller. In this regard, every buyer may

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<sup>1</sup>Ibn 'Ābidīn ((Ḥanafī), vol.4, p.199 onwards).



demand such compensation even before buyers further down the chain demand theirs.

2. Entitlements that transfer ownership from one party to another are the most common. For instance, if A claims that a property in B's possession belongs to him and provides proof for his claim, ownership rights are thus transferred from B to A.

This type of entitlement need not void a contract. For instance, if C sold the property to B, and then A made an entitlement claim to the property, the sale is suspended pending the entitled party's decision to permit the sale or to void it. Most Ḥanafis ruled in this case that the contract would only be voided if the buyer demands compensation for the price from the seller. Moreover, most jurists seem to agree that voiding the sale requires mutual consent, and does not take effect merely by the establishment of entitlement.

If this type of entitlement results in voiding a chain of sales, then each buyer in the chain is only allowed to claim compensation for the price he paid after the buyer further down the chain demands compensation from him. This ruling is based on the desire to prevent one party (the middle buyer) from collecting two prices for the same item of sale.

Entitlement claims apply to the possessor of a property, and anyone from whom the possessor may have gained ownership. Thus, the author of *Al-Durr Al-Mukhtār* said: "The ruling of entitlement is a ruling on the possessor of a property, and everyone from whom he obtained ownership, including inheritance. In the case of entitlement of inherited property, the entitlement effects extend to all the heirs".

### 85.2.1 Proofs of entitlement claims

If an entitlement claim is established legally for some property, then the buyer of that property may demand compensation from the seller for the price he paid. Thus, the proof of entitlement extends to any party in possession of the property. Consequently, that proof requires a ruling by a court of law, since its consequences affect the rights of the public, and thus it must be issued by a public authority.

In contrast, if a claim of entitlement is only established through an acknowledgement by the buyer or his lawyer, or if they deny the claim but refuse to support their denial with an oath, then the buyer does not have the right to demand compensation for the price from the seller. This follows from the fact that the buyer's acknowledgement of the claim can only affect him, and thus cannot be extended to affect the seller, since he has no legal authority over him.<sup>2</sup>

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<sup>2</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.203).



### 85.2.2 Self-contradicting claims

If one party makes two contradictory claims at different points in time, any claim thereof regarding ownership of property or usufruct is voided.<sup>3</sup> For instance, A would be contradicting himself if denied that B was his brother, to avoid responsibility for one of his liabilities, and then later claimed to be B's brother upon his death, to share in his inheritance. Thus, A's claims will be rejected legally due to the self-contradiction.

On the other hand, if the first claim did not establish any legal rights, then later claims are not rejected. For instance, if a person absolves all the residents of a town of all debts, he may later claim that a resident of that town owes him a debt.

Moreover, a latter claim is not rejected if the prior claim related to unknown circumstances (e.g. a tie of kinship, divorce, or freedom of an individual):

- For instance, a person may claim entitlement of a dress that he had bought in a wrapping, and thus that he could not identify.
- An example relating to kinship is the following. If a slave was sold and resold, and then the first seller claimed that the slave was in fact his free son, his claim is thus accepted. Consequently, both sales will be invalidated. This may happen since the first seller may have not been aware at the time of the kinship tie, and hence he is excused for contradicting his earlier claim (that the sold individual was his slave).
- An example relating to divorce is the following. A woman and the heirs of her ex-husband may exchange oaths, and (being adults) they may acknowledge that she was indeed married to him towards the end of his life. Then, if they can later provide a proof that he had divorced her three times during his lifetime, they may recollect the portion of the estate that she was given.
- An example relating to freedom of a human is the following. If either the buyer or the seller can provide a proof that the slave was freed prior to his sale, the claim is thus accepted. In this regard, contradiction between the two claims before and after the sale is permissible in the case of slave freeing.

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<sup>3</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.205 onwards).



## Chapter 86

# Rulings for Specific Contracts

### 86.1 Sales and barter

Entitlement of one of the compensations in a barter sale invalidates the sale.<sup>1</sup> Thus, if a house is exchanged for a car, and then a claim of entitlement is proved for the car, then the sale is voided even if the house was bought by a party with preemption rights.

There are a number of juristic opinions regarding the effects of entitlement on regular sales, which we shall discuss in some detail.

#### 86.1.1 Ḥanafī rulings

The Ḥanafīs stipulated a number of consequences of entitlement, depending on whether the claim of entitlement pertained to part of the object of sale, all of the object of sale, or the right to withhold the object of sale.<sup>2</sup>

##### (i) Partial entitlement of the merchandise

If a claim of entitlement to part of the merchandise is proved prior to receipt, and if the entitled party did not permit the sale, then the sale is invalidated for the entitled portion. This ruling follows from the fact that the proof of entitlement is a proof that the entitled portion was sold without its rightful owner's permission. In this case, the buyer is given an option to take the remainder of the merchandise in exchange for its portion, or to void the sale. The buyer's option is established regardless of whether or not the remaining portion of the merchandise became defective. This ruling follows from the fact

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<sup>1</sup>'Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.211).

<sup>2</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.288 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.175 onwards).



that once the entitled party proved his claim and refused to permit the sale, the contract was divided for the buyer prior to the contract's conclusion. Thus, the buyer is given the described option in analogy to the case of a divided sale.

The sale is voided for the portion of merchandise to which another party is entitled, regardless of whether the merchandise was partially or fully received. Then, if the entitlement of a portion implies a defectiveness in the remainder (e.g. through partnership, if the entitled portion was part of a house or car), then the buyer is given the option of taking the remaining portion for its share in the price, or voiding the sale based on that defect.

However, if the buyer had received all of the merchandise and entitlement to a portion thereof does not render the rest defective (e.g. entitlement was claimed for one of two sold cars, or one of two sold measures of wheat), then the buyer is bound by the other portion of the sale. In this case, dividing the merchandise does not harm the buyer, and hence he is not given an option to return the merchandise.

In summary, a proved claim of entitlement to part of the merchandise results in a divided sale for the buyer. Thus, if the buyer had not yet received the merchandise, he is given the option of taking the remaining part for its share of the price, or voiding the contract based on its partitioning. On the other hand, if the buyer was already in receipt of the merchandise, and the partitioning was viewed as harmless, then the buyer is bound for the remaining portion in exchange for its corresponding portion of the price.

## (ii) Full entitlement of the merchandise

If an entitlement claim to the entire merchandise is approved by a court of law based on provided evidence, the sale is deemed suspended pending the entitled party's permission. Thus, if he permits the sale, the buyer may keep the merchandise, and the entitled party may thus take the price from the seller. This ruling follows from considering the seller as the owner's selling agent, since ex post authorization is considered to be equivalent to ex ante agency authorization. On the other hand, if the owner does not permit the sale, then it is voided (by apparent mutual consent), and the seller must thus return the price to the buyer.

One notable exception is the case of properties established as a mortmain. In this case, the sale is necessarily voided if the property is proved to be established thus, since nobody can authorize the sale of such property.

There are three conditions that must be established so that the buyer is authorized to demand compensation for the price from the seller:<sup>3</sup>

1. The entitlement claim must pertain to ownership that preceded the sales contract, thus transferring ownership from the seller to the entitled party. Consequently, if a property was sold a year ago, and the entitlement claim pertains to its ownership a month ago, then the buyer has no claims on

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<sup>3c</sup> *Aqd Al-Bayc* by Professor Al-Zarqā' (p.100 onwards).



the seller. In this case, the entitlement affects the buyer's ownership of the property, and not the seller's.

2. If the buyer agreed with the entitled owner to return the merchandise in exchange for part of the price, then the buyer would have voided his right to demand compensation from the seller. On the other hand, if the agreement was that the buyer would retain the merchandise in exchange for an amount of money paid to the entitled owner, then the buyer retains the right to demand compensation for the price he paid to the seller.
3. If the seller had absolved the seller of the price prior to the establishment of entitlement, then the buyer has no right to demand compensation for the price, since he did not pay anything for the merchandise.

If the buyer had not yet received the merchandise that is subject to the claimed entitlement, then the judge must only consider the claim in the presence of the buyer and the seller. This rule follows since the entitlement claim thus pertains to a property that is owned by the buyer and held in the seller's possession. Thus, both parties must be present.

On the other hand, only the buyer needs to be present if the entitlement claim is issued after the merchandise was in his possession. On the other hand, the buyer is entitled to demand that the seller be included as a third party in the lawsuit, since the right to demand repayment of the price affects him.<sup>4</sup>

Any increases in the merchandise (e.g. offspring) may similarly be reclaimed by the claimant of entitlement if he can prove it in a court of law. This ruling again follows from the fact that a court's ruling is extended to the rights of all parties. In contrast, if ownership of the offspring is acknowledged by the buyer, or by his refusal to support his denial with an oath, does not authorize the claimant to take the offspring, since acknowledgement only affects the rights of the acknowledging party.<sup>5</sup>

### (iii) Entitlement to withholding rights

If a claimant can prove his entitlement to withhold the merchandise (e.g. if it is pawned with him, or leased to him) in a court of law, then:

- If the entitled party permits the sale, the pawning or lease is voided. In the case of pawning, the price takes the place of the sold property as the object of pawning, and the pawn-broker is permitted to withhold the merchandise until he receives the price. In the case of leasing, the lessee is permitted to withhold the sold property until he receives a refund of any paid rent for the remaining period.<sup>6</sup>
- If the withholding party does not permit the sale, he is not authorized to void it. In this case, the entitled party is only permitted to retain

<sup>4</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.207).

<sup>5</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.204 onwards).

<sup>6</sup>c.f. *Al-Majallah* (pp.590,747).



possession of the property, and the buyer is given the option of waiting until the property is released from pawning or leasing, or to void the contract and have the paid price refunded.

### 86.1.2 Mālikī rulings

If a person proved his claim of entitlement to a property in the possession of another, then the Mālikīs distinguish between the cases where the entitlement is partial or total.<sup>7</sup>

- If the entitled party has a partial right to a sold property, then he may only demand compensation for the value of his entitlement, and may not demand to take the entire property.
- If the claimant is entitled to the entire property, or most of it, and if the property had not changed, then the claimant may take it, and the buyer may seek a refund of the price from the seller.

On the other hand, if the property had changed in a manner that changed its value, then the claimant should demand compensation from the buyer for the value of the property on the day of the sale.

- If the change was a contiguous increase of the property (e.g. if it is an animal that got larger in size), then the claimant may take the property with the increase. However, if the increase was caused by the buyer (e.g. extensions that he built to the house he bought), then the claimant is given the option of paying for the increase and taking the full property, receiving a payment for the property and leaving it with the buyer, or sharing ownership of the larger property with the buyer, in proportion to the entitlement of each. This opinion is based on a ruling by <sup>c</sup>Umar ibn Al-Khaṭṭāb.
- If the change was a diminution in the property, then the possessor of the property is not liable to the entitled claimant for that diminution if he did not cause it. On the other hand, if he caused the diminution (e.g. by destroying parts of a house and selling the rubble), then the entitled claimant may take the price from him.

### 86.1.3 Shāfiʿī rulings

In what follows, we shall list some of the Shāfiʿī rulings regarding the effects of entitlement claims:<sup>8</sup>

- Partial entitlement of sold merchandise result in a partitioning of the contract. Thus, the majority of Shāfiʿīs referred in this case to their view that each portion of the merchandise should receive a separate ruling when a

<sup>7</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.320 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.470).

<sup>8</sup>Abū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, pp.269,288), Al-Khaṭīb Al-Shīrbīnī ((Shāfiʿī), vol.2, pp.40-42,65-66), Al-Ḥūt Al-Bayrūtī (, vol.2, p.349 onwards).



sale is divided. Thus, the sale is deemed invalid for the portion owned by the claimant, and valid for the rest. The buyer may then seek a refund for the portion of the price corresponding to the claimed portion.

- If a full entitlement claim is accepted, then the buyer may seek a full refund from the seller, whether or not he knew of the entitlement at the inception of the contract. This ruling follows from the fact that ownership is taken away from the buyer in this case based on a legal reason that existed while the property was in the seller's possession. Thus, the sale is voided.
- If the entitlement claim was made after the sale but before delivery, the claimant is not allowed to demand compensation for the property from the buyer, since the latter had not received the property. Moreover, if the first buyer re-sold the property without ever taking possession of it, the claimant is not allowed to demand delivery from the first buyer.

In this case, if the buyer placed the property in the buyer's possession, the buyer would not guarantee it. Thus, the claimant may not demand compensation from the buyer, since placement in the latter's possession is not considered a receipt if the sale is invalid. Similarly, giving the buyer access to a property is only considered a receipt by the buyer if the sale is valid.

- If the buyer acknowledged the seller's ownership of the property, and then a third party claimed entitlement to it, the buyer may still demand a refund from the seller. In this case, the buyer's acknowledgement was justified by the apparent ownership of the seller who was in possession of the property.
- The Shāfi'is agreed with the Ḥanafīs that the buyer is not allowed to seek a refund if the entitlement was established by the buyer's explicit acknowledgement or refusal to support his denial of the claim with an oath. The Shāfi'is ruled in this case that buyer is not entitled to a refund due to his contradictory actions of buying the property and acknowledging the entitlement claim, or by his refusal to support his denial of the claim with an oath.
- On the other hand, if the claimed entitlement is established with a material proof, or by the joint acknowledgement of the buyer and seller, then the buyer is entitled to a refund of the price or equivalent compensation thereof if the price had perished.

#### 86.1.4 Ḥanbalī rulings

The Ḥanbalīs ruled<sup>9</sup> that the buyer is entitled to a refund of the price and any expenses associated with the sold property (e.g. the cost of building or planting

<sup>9</sup> Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.216; vol.4, pp.47,112-3, 357).



trees in the sold land) if an entitlement claim to the property is established. They based this ruling on the fact that the seller thus deceived the buyer by selling him a property that the buyer presumed was his. The entitled party may then remove the plants or buildings that the buyer put in his land, without having to compensate the buyer for them. Thus, the Ḥanbalīs said: “If the buyer built on the land he bought, and then the entitled owner took the land and demolished the building, the buyer is entitled to the rubble, since it is his property. In this case, the buyer may seek compensation for his losses from the seller, who deceived him by selling him the property of another”. Al-Shaykh Al-Taḥiyy restricted the latter ruling to the case where the seller was aware of the entitlement of another to the property, otherwise he ruled that there was no deception. The general Ḥanbalī ruling in this case can be useful as a basis for other rulings regarding compensations for financial loss.

On the other hand, the buyer is not entitled after the claimant’s entitlement to a refund of expenses he spent on purchased animals or to the paid land-taxes, since he was bound by the sales contract to the obligation for the expenditures and taxes associated with the property.

## 86.2 Entitlement of a pawned object

### 86.2.1 Ḥanafī rulings

If ownership of part of a pawned property is established through an entitlement claim, the Ḥanafīs ruled as follows regarding the rest of the property:<sup>10</sup>

- If the remainder of the property was eligible for pawning by itself, that part of the pawning is not rendered defective through the entitlement of the other part.
- On the other hand, the entire pawning would be rendered defective if the remainder of the property could not have been pawned independently. This ruling is made by analogy to that regarding pawning an unidentified portion of a property. The latter ruling is relevant since the invalidity of the entitled portion of the pawning makes the remaining part an unidentified portion of the property, hence rendering the pawning invalid.

### 86.2.2 Mālikī rulings

The Mālikīs ruled that if entitlement is established for a specified part of a pawned property, then the remaining part becomes a pawning in lieu of the entire underlying debt.<sup>11</sup> On the other hand, if entitlement is established for an unidentified part of the pawned property, they ruled that the pawning debtor

<sup>10</sup> Al-Kāsānī ((Ḥanafī), vol.6, pp.141,151).

<sup>11</sup> Al-Kḥarshī (1317H, 1st and 2nd editions (Mālikī), vol.5, pp.288,298 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.238).



must give the creditor an equivalent property in lieu of the part that was not his by entitlement.

On the other hand, they ruled that if the entire pawned property was an object of entitlement prior to receipt, then the creditor is given the option to void the contract, or to execute it without a pawning. On the other hand, if the pawned property was received by the creditor prior to the entitlement claim, the debt would thus not be insured by a pawning, unless the debtor had deceived him, in which case he has an option to void the contract.

In this regard, if real estate or an animal was pawned, and then the entitled party left his entitled share in the property with the creditor, the latter would not guarantee it against destruction. This ruling follows by the fact that once that portion was claimed through entitlement, it was no longer an object of pawning. Hence the creditor would only guarantee the un-entitled part of the pawned property.

### 86.2.3 *Shāfiʿī* rulings

The *Shāfiʿīs* ruled that if pawned property is sold, and then becomes the object of a valid entitlement claim, then the buyer may seek a refund from the pawning debtor.<sup>12</sup> This ruling follows from the fact that the pawned property was sold under the assumption that it belonged to the debtor, and hence he must bear ultimate responsibility for the property. In this case, the buyer is entitled to seek a refund from the trustee who held the pawned property, but then the trustee may seek a refund from the pawning debtor, who is the ultimate guarantor of the property.

### 86.2.4 *Ḥanbalī* rulings

The *Ḥanbalīs* ruled that<sup>13</sup> the pawn-broker is obliged to give the pawned property to its rightful owner if a valid entitlement claim is established. In this case, they ruled that the pawning was invalid at its inception.

Moreover, they ruled that if the pawned property was sold prior to the valid entitlement claim, then the buyer may seek a refund from the pawning debtor. They based this ruling, in agreement with the *Shāfiʿīs*, on the view that the object was sold under the assumption that it was owned by the pawning debtor, and hence the latter must bear responsibility for it. On the other hand, they ruled that the buyer is not entitled to seek a refund from a trustee in the pawning, if the latter informed him that he was merely a selling agent.

<sup>12</sup> Al-Khaṭīb Al-Shirbīnī (*Shāfiʿī*), vol.2, p.135).

<sup>13</sup> Ibn Qudāmah (, vol.5, p.397), Al-Buhūtī (3rd printing (*Ḥanbalī*), vol.3, p.334).



## 86.3 Division of joint property

### 86.3.1 Ḥanafī rulings

The Ḥanafīs ruled<sup>14</sup> that division of joint property is invalidated from its inception if the property later becomes the object of a valid claim of entitlement. On the other hand, they ruled in the case of partial entitlement to the divided property that the division is invalidated only for the entitled portion.

### 86.3.2 Mālikī rulings

The Mālikīs ruled<sup>15</sup> that if joint property is divided, and then part of it becomes an object of entitlement, then:

- If all of the property in the possession of one of them becomes the subject of a valid entitlement claim, the division is voided, and joint ownership is restored.
- If one-half, or one-third of the share of one of the co-owners becomes an object of entitlement, then he is given the option of keeping the rest and seeking no compensation, or being compensated through co-ownership with the previous co-owner for half of the entitled amount.
- If one-quarter of the share of one of the previous co-owners becomes the object of entitlement, then he has no options. In this case, the division remains final, and he may not return as a co-owner for half of what was entitled. Instead, he is entitled in this case to seek separate compensation for that half of the entitled portion.

### 86.3.3 Shāfiʿī rulings

The Shāfiʿīs ruled as follows:<sup>16</sup>

- If an unidentified part of the divided property becomes entitled after division, then the division is invalidated for the entitled part. For the remaining part of the divided property, the two rulings pertaining to the division of the contract apply. The most widely accepted of those two opinions is the validity of the division and the establishment of an option [to void it]. The option is established in this case since the objective of dividing the property, which is to identify each party's share, would not be accomplished. The option is also established since the entitlement may make the division unfair to some of the ex-co-owners.
- On the other hand, they ruled that if the same amount is entitled out of each party's share, the division thus remains intact for the rest. In this

<sup>14</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.24).

<sup>15</sup> Al-Dardīr ((Mālikī)A, vol.3, p.514).

<sup>16</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.425).



case, each of the co-owners would have taken his due share through the division.

- However, if the entitlement was divided unequally among the division shares, then the division is invalidated. This ruling follows from the fact that the entitlement thus made the division unfair, and each party has a right to demand compensation from the other. Hence the remaining property would return to joint ownership.

### 86.3.4 Ḥanbalī rulings

The Ḥanbalīs ruled as follows:<sup>17</sup>

- The division is invalidated if part of the share of either co-owner became an object of entitlement. They based this ruling on the fact that the division would thus become unfair after the entitlement.
- On the other hand, they agreed with the Shāfiʿīs that if the entitlement pertained equally to the shares of both co-owners, then the division remains fair and valid.
- However, if the entitlement affects the two parties asymmetrically, by harming one party more than the other, then the division would thus become unfair, and therefore it is invalidated.

The Ḥanbalīs also ruled that the division is invalidated if an unidentified portion of the total property, since the entitled party thus becomes a third partner. Since that third partner had not approved of the division, it is thus invalidated.

Finally, if the entitlement is an unidentified share in the share of one of the co-owners, then the division is unfair and thus invalidated.

## 86.4 Effect in settlements

### 86.4.1 Ḥanafī rulings

The Ḥanafīs ruled as follows regarding the effects of entitlements on settlements:<sup>18</sup>

- If settlement was concluded in exchange for a financial compensation, and then the compensation was taken from the claimant due to a valid entitlement, the settlement is thus invalidated. This ruling follows from the fact that a condition of validity of the settlement was violated, namely that the object of settlement was not owned by the settling party at the time of settlement.

<sup>17</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.376).

<sup>18</sup>Al-Kāsānī ((Ḥanafī), vol.6, pp.58,54), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.29).



- If the claimed debtor settled the claim while acknowledging its validity, then if part of the claimed debt is appropriated through entitlement, the claimed debtor may seek a refund of the corresponding portion of his settlement compensation. This ruling follows from the fact that the settlement in this case was tantamount to a commutative sales contract. Similarly, if all of the underlying debt was appropriated based on an entitlement claim, the settling claimed debtor may seek a full refund of the settlement compensation.
- If the claimed debtor had settled the debt while denying the claimed debt or failing to acknowledge it, and then the claimed debt was appropriated through a valid entitlement claim, the claimant may transfer his claim to the entitled party, who thus takes the place of the claimed debtor. In this case, the claimant must return the settlement compensation to the initial claimed debtor, since the latter only paid the compensation to end the dispute, which is nullified by the entitlement. Thus, the claimant does not have any reason to continue to hold the claimed debtor's property, in analogy to the case wherein a debtor gives his money to the guarantor to repay his debt, and then repays it himself. In both cases, the debtor must be refunded since what he paid the claimant or the guarantor no longer serves its intended purpose.

#### 86.4.2 Mālikī rulings

The Mālikīs ruled as follows:<sup>19</sup>

- If an acknowledged claim is settled with a fungible or non-fungible compensation, and then the settlement compensation was appropriated due to a valid entitlement claim, then the claimant may renew his original claim if the original property is still intact. On the other hand, if the property that was acknowledged as a liability had perished, the claimant may thus demand its value if it was non-fungible or its equivalent if it was fungible.
- If a denied claim is settled for a fungible or non-fungible compensation, and then the claimed liability was appropriated based on a valid entitlement, then the claimed debtor may seek a refund of the settlement compensation from the claimant, provided that the compensation remained intact. If the settlement had perished, then the claimed debtor may seek a refund of its value if it was non-fungible, or its equivalent if it was fungible.

On the other hand, if the claimed debtor had acknowledged the claimed liability, then he may not seek a refund of the settlement compensation. In this case, the claimed debtor is understood to be acknowledging that the property belonged to the claimant, and thus that the entitlement appropriator usurped it.

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<sup>19</sup> Al-Dardīr ((Mālikī)A, vol.3, p.470), Al-Dardīr ((Mālikī)B, vol.3, p.626).



Consequently, if the buyer of a property concludes the sale knowing that the seller is the owner, then he may not seek a refund from the seller if the property is appropriated based on an entitlement. The ruling in this case is also based on the view that the appropriator is thus a transgressor.

### 86.4.3 Shāfiʿī rulings

The Shāfiʿīs rule<sup>20</sup> that the settlement is voided if the underlying debt is appropriated based on a valid settlement. In this case, if full appropriation was impossible due to the diminution in the claimed property, the claimed debtor may seek a partial refund in proportion to the value of the appropriated portion, in analogy to the case where the compensation was sold.

### 86.4.4 Ḥanbalī rulings

The Ḥanbalīs ruled<sup>21</sup> that if a settlement compensation was appropriated due to a valid entitlement claim, then the claimant may renew his initial claim. This ruling follows from the view that the settlement of an acknowledged claim in this case is in fact a sale, and that sale is defective if the compensation was appropriated based on entitlement. Thus, the claimant claim is reinstated.

In contrast, if the underlying claim in the settlement was the right to exact physical retribution for murder (*qiṣāṣ*), the settlement is not seen as a sale. Thus, if such a claim was settled for valuable property which was later appropriated, the claimant may only demand compensation for its value from the claimed debtor.

Moreover, if the claimed debtor had settled the claim while denying its validity, and then the settlement compensation was appropriated based on a valid entitlement claim, the claimant may renew his claim. This ruling follows by the resultant invalidation of the settlement.

## 86.5 Effect on lease and hire

### 86.5.1 Ḥanafī rulings

The Ḥanafīs ruled<sup>22</sup> that a lease is valid if the entitlement to the leased property is established before the extraction of usufruct, and the entitled party permitted it. In this case, the owner is entitled to the rental value if the leased property continued to exist. On the other hand, if the entitled owner permitted the lease after it had expired, the rent would accrue to the lessor rather than to the owner. The latter ruling follows from the fact that in this case the object's usufruct would have perished at the time the permission was issued, and hence the lease was no longer existent.

<sup>20</sup> Al-Ḥūt Al-Bayrūtī (, vol.2, p.218).

<sup>21</sup> Ibn Qudāmah (, vol.5, p.493).

<sup>22</sup> Al-Kāsānī ((Ḥanafī), vol.4, p.177).



If the entitled owner gave his permission mid-way through the lease period, then 'Abū Yūsuf ruled that the lessor was a usurper, and the owner is entitled to all of the rent. On the other hand, Muḥammad ruled that the usurping lessor is entitled to all rent prior to the permission, and the owner is entitled to all the rent thereafter.

### 86.5.2 Mālikī rulings

The Mālikīs ruled<sup>23</sup> that a lessor who was in possession of a land for a period of time (and thus may be its owner) is entitled to all rents prior to the establishment of entitlement for another owner. Then, the entitled person is given an option of voiding the remainder of the lease, or to permit it and take the remaining lease payments. This ruling follows from the fact that the lessor was an apparent owner (who would have remained thus if the entitlement did not come into effect), and thus was entitled to the output of the property.

### 86.5.3 Shāfi'ī rulings

The majority of Shāfi'īs ruled<sup>24</sup> that the appropriation of leased property based on entitlement is similar in legal status to the perishing of that property. In this regard, they ruled that a lease is voided if the leased property perished and its usufruct ceased to exist, in analogy to the voiding of a sale if its object perished prior to receipt. Thus, they ruled that a lease is voided if the leased property is appropriated based on a valid entitlement claim, since the object of the contract would thus have perished.

### 86.5.4 Ḥanbalī rulings

The Ḥanbalīs ruled<sup>25</sup> that the lease is invalidated if a leased non-fungible property (e.g. a specific camel leased for transportation) is appropriated based on a valid entitlement. Thus, the lessor is not responsible to provide the lessee with an equivalent rental property. However, if the leased property was a non-fungible described as a liability on the lessor, and then it was appropriated based on a valid entitlement, the lessor is responsible to provide another object of lease, and the lease remains valid. In the latter case, the object of the lease was only determined by its characteristics, and thus continues to exist.

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<sup>23</sup> Al-Dardīr ((Mālikī)A, vol.3, p.463).

<sup>24</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.355-7).

<sup>25</sup> Ibn Qudāmah (, vol.5, p.432).



## 86.6 Effect on crop-sharing

### 86.6.1 Ḥanafī rulings

The Ḥanafīs ruled<sup>26</sup> that a worker may seek an equivalent wage for his work if the tended palm trees are appropriated based on entitlement while carrying fruit. Otherwise, if the appropriated trees carried no fruits, then the worker is not entitled to any wages. This ruling follows by analogy to the ruling that the worker is not entitled to any compensation if the land is appropriated prior to being planted. On the other hand, we have seen that the farmer is entitled to seek compensation for the value of the crop if the land is entitled after producing one.

### 86.6.2 Mālikī rulings

The Mālikīs ruled<sup>27</sup> that the entitled owner of a garden has the option of voiding a crop-sharing contract for that land, or keeping the worker. The option to void the contract is given to the owner since that contract was concluded by a party other than the garden's owner. If the entitled owner thus chooses to void the contract, then all existing output of the land belongs to him, and he must pay a market wage to the worker in proportion to his work, to prevent harming him unjustly.

### 86.6.3 Shāfi'ī rulings

The Shāfi'īs ruled<sup>28</sup> that the crop-sharing worker is entitled to a market wage for his work if the fruits of his labor are appropriated by another party before or after his work (e.g. through a will, or a valid entitlement claim). This ruling is based on the view that the worker's benefits were wasted by his crop-sharing principal, and thus the latter must compensate him with a market wage for his work. However, this ruling applies only if the worker was not aware of the situation at the inception of the crop-sharing contract. On the other hand, if the worker was in fact aware of the situation, then he is not entitled to any compensation.

### 86.6.4 Ḥanbalī rulings

The Ḥanbalīs ruled<sup>29</sup> that the entitled owner of the land is also entitled to all the fruits of the land. In this case, they ruled that the worker is only entitled to receive a compensation in the form of a market wage that he can only demand from the usurper, who deceived him through the crop-sharing contract.

<sup>26</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, p.201).

<sup>27</sup>Al-Dardīr ((Mālikī)A, vol.3, p.547), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.261), 'Ibn Rushd Al-Hafīd ((Mālikī), vol.2, p.321).

<sup>28</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.331).

<sup>29</sup>Ibn Qudāmah (, vol.5, p.381).



## 86.7 Effect on marriage

### 86.7.1 Appropriation of the dowry

#### Ḥanafī rulings

The Ḥanafīs ruled<sup>30</sup> that a specific named dowry (e.g. a specific house) is valid even if it is appropriated based on a valid entitlement claim prior to delivery. In this case, the husband has to deliver the value of the named property (rather than an identical one), since the property itself cannot be delivered due to its appropriation.

If half of the house named as dowry was appropriated, then the wife has an option of returning the remaining part based on a major defect (of partnership with the entitled party), or keeping it. If she decides to return the remaining part, then she can demand payment of the value of the entire house, and if she keeps the remaining part, then she can demand payment of the value of the entitled part. In this case, if the husband were to divorce her prior to consummating the marriage or paying a compensation, she may keep the part of the house that was given to her.

#### Mālikī rulings

The Mālikīs ruled<sup>31</sup> in accordance with the Ḥanafīs that the wife is entitled to seek payment of the value of her named dowry (rather than the customary dowry for the likes of her) if it is appropriated based on an entitlement, or if she finds a defect in it. This ruling is based on the view that marriage is based on mutual generosity of the two parties, and thus the wife may demand compensation with a small portion of the dowry, or for many multiples thereof. On the other hand, Mālikī jurists differed in their rulings, with some of them ruling that she may seek compensation with the customary dowry for her likes, and some ruled that she may seek compensation for that customary dowry or the value of what was entitled.

#### Shāfiʿī rulings

Most of the Shāfiʿīs ruled<sup>32</sup> that the husband is liable for the customary dowry for the likes of the prospective wife if the named dowry was usurped property, or was a non-property like wine. This ruling follows from the fact that the marriage is deemed valid, but the named dowry (which is owned by another or a non-property) is defective.

<sup>30</sup> Al-Kāsānī ((Ḥanafī), vol.2, p.278), Ibn Al-Humām ((Ḥanafī), vol.2, pp.455,462).

<sup>31</sup> Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.28), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.3, p.296; vol.6, p.1).

<sup>32</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.225).



### Ḥanbalī rulings

The Ḥanbalīs ruled<sup>33</sup> that the wife is entitled to the value of the named dowry if that latter was a specific non-fungible (e.g. a named house) that was appropriated based on a valid entitlement claim. This ruling follows from the fact that she would thus have implicitly accepted the value of the named dowry on the basis of which she concluded the marriage. On the other hand, if the husband had said: “I give you as dowry this usurped house”, then the wife would have accepted to marry with no dowry, and hence she is entitled only to the customary dowry for her likes. In the latter case, since the wife knew full well that the husband cannot transfer to her ownership of a property he had usurped, the naming of that property is immaterial.

They ruled that the wife has an option if part of her dowry is appropriated based on a valid entitlement claim. Thus, she may take the value of the entire named dowry, or take the un-appropriated part of the dowry and the value of the appropriated part. This ruling follows from the view that partnership with the entitled party is a defect in the property, and thus she must have the option in analogy to all other defects.

In summary, the non-Shāfiʿī jurists ruled that the wife is entitled to the dowry’s value if it is appropriated, while the Shāfiʿīs ruled that the wife is thus entitled only to the standard dowry.<sup>34</sup>

### 86.7.2 *Kḥulʿ* (divorce at the instance of the wife)

#### Ḥanafī rulings

The Ḥanafīs ruled<sup>35</sup> that the divorced wife is liable for the value of any property that she used in a *kḥulʿ* if it is appropriated based on a valid entitlement claim. This ruling is based on the fact that the reason for delivery (to compensate the husband for the divorce) remains, while the possibility of delivering the property ceased to exist after the appropriation.

#### Mālikī rulings

The Mālikīs ruled<sup>36</sup> that a divorced wife must give her ex-husband the value of the named non-fungible divorce compensation if it is appropriated. The relevant value in this case is the value of the named property on the day of the *kḥulʿ*. On the other hand, if the divorce compensation was fungible, then she is responsible to deliver its equivalent upon the appropriation of the named compensation.

Those are the rulings if the husband was not aware that the compensation was not her property at the inception of the *kḥulʿ*.

<sup>33</sup>Ibn Qudāmah (, vol.6, pp.689-90), Marʿī ibn Yūsuf (1st printing (Ḥanbalī), vol.3, pp.60,62).

<sup>34</sup>Tr.: In all of the preceding, I used “standard dowry” for *mahr al-mithl*, which is the standard dowry for a similar couple, as determined in society for other couples of their same ages, social class, etc.

<sup>35</sup>Ibn Al-Humām ((Ḥanafī), vol.3, p.209).

<sup>36</sup>Al-Dardīr ((Mālikī)A, vol.2, p.349 onwards).



On the other hand, if he knew at that time, or if they both knew, then he is not entitled to any alternative compensation. If she knew, but he did not know, then he is entitled to an equivalent compensation if the named compensation was a fungible liability identified by its characteristics. However, if she knew and he did not, and the named *khulʿ* compensation was a specific non-fungible, then the divorce at her instance is voided.

The same rulings apply if the named *khulʿ* compensation was stolen or usurped property. Thus, if he did not know at the time, he may demand compensation in value if the compensation was non-fungible, and equivalent property if it was fungible.

### Shāfiʿī rulings

The Shāfiʿīs ruled<sup>37</sup> that the ex-husband is entitled only to the standard dowry if the named *khulʿ* compensation was a specific non-fungible, and it perished prior to receipt, was appropriated based on a valid entitlement claim, or was returned based on missing a stipulated characteristic. In this regard, they ruled that whatever required compensation in her possession is considered equivalent to his possession of the dowry. In this regard, both possessions are possessions of guaranty by virtue of the *khulʿ* and marriage contracts, respectively.

### Ḥanbalī rulings

The Ḥanbalīs ruled<sup>38</sup> that the *khulʿ* is valid even if the compensation named in the contract is discovered not to be the wife's property. This ruling is based on the view that *khulʿ* is a commutative contract in which property is exchanged for a dropping of the right to marital relationships. Thus, *khulʿ* is not rendered defective if the compensation is defective, in contrast to marriage contracts where the compensation makes marital relationships lawful. Thus, the ex-husband may seek compensation from the ex-wife for the value of the named property in the *khulʿ*.

## 86.8 Effect on wills and mortmain

### 86.9 Ḥanafī rulings

The Ḥanafīs ruled<sup>39</sup> that if a plenipotentiary sold a property of the deceased and spent its price on charity, following the instructions of the deceased, then the plenipotentiary is a guarantor of the property against any entitlement. This ruling follows from the fact that the plenipotentiary was the active party in the sales contract, and thus he is the guarantor of that property for its rightful

<sup>37</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.265).

<sup>38</sup> Ibn Qudāmah (, vol.7, p.73).

<sup>39</sup> For rulings regarding mortmain properties, c.f. Ibn Al-Humām ((Ḥanafī), vol.5, p.46 onwards); and for rulings regarding wills, c.f. Ibn Al-Humām ((Ḥanafī), vol.8, p.498 onwards).



owner. In this regard, the buyer only paid the price to get the property, and the seller is the one who sold the property of another without his consent. Thus, the entitled party may seek compensation from the selling plenipotentiary. The latter may then in turn seek compensation from the estate of the deceased, in analogy to the ruling for the selling agent of a deceptive principal. Thus, the guaranty compensation is in fact established as a debt on the deceased, and it may be extracted from any part of his estate. On the other hand, if the plenipotentiary was in fact an officer of the court, then he should not be considered a guarantor, lest society may bear the cost.

On the other hand, if the estate had perished, or was not sufficient to compensate the plenipotentiary, then he may not seek compensation from the heirs or the poor who received the price as charity. This ruling follows from the fact that the sale was only concluded on behalf of the deceased, and thus the property's value becomes established as one more debt on the deceased.

Muḥammad ruled that the act of establishing a property as a mortmain (*waqf*) is invalidated if an unidentified part of it is appropriated based on a valid entitlement claim. This ruling is based on the view that the entitlement in this case distributes the ownership of the property without identifying the shares of the owners, and this lack of identification renders establishment of a mortmain invalid, in analogy to the ruling that invalidates giving an unidentified portion of a property as a gift. Then, as the establishment of a mortmain is invalidated for the portion for the property that was not claimed in the entitlement, that property is returned to the owner if he is alive, or to his heirs if he had died.

On the other hand, if a specific identified part of the property is appropriated based on a valid entitlement claim, then the rest would remain in mortmain. In this case, ownership by the entitled party is not distributed over the entire property, and hence it was possible at the inception of the mortmain to exclude the appropriated part from the mortmain.

## 86.10 Shāfiʿī rulings

The Shāfiʿīs ruled<sup>40</sup> that if a man gave in his will one-third of a house to some recipient, and two-thirds of the house was appropriated based on an entitlement claim, then the recipient may take the remaining third. This ruling is based on the view that the intent of the will was to benefit the heir, and hence he should be given the remainder of the property. A minority view in this case suggested that the recipient should only be entitled to one-third of the remaining property (i.e. one-ninth in our example), but Al-ʿIsnawī corrected that statement. This ruling presupposes that the remaining one-third of the house does not exceed the permissible one-third of the estate that the deceased could give to non-inheritors. However, if the estate of the deceased was too small to allow that, then the recipient may only take up to one-third of the estate of the deceased.

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<sup>40</sup> Al-Ḥūt Al-Bayrūtī (, vol.3, p.62).



### 86.11 Ḥanbalī rulings

The Ḥanbalīs ruled<sup>41</sup> that if a man gave in his will one-third of a house to some recipient, and two-thirds of the house was appropriated based on an entitlement claim, then the recipient is entitled to the remaining one-third if it is part of the voluntary one-third of the estate given to non-inheritors. Otherwise, he would be given one-third of the one-third, unless the heirs allow him to take more. This agrees with the correction of Al-'Isnawī that we mentioned above.

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<sup>41</sup>Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.368).



## Chapter 87

# Entitlement to Sacrificial Animals

### 87.1 Ḥanafī rulings

The Ḥanafis ruled<sup>1</sup> that if a man bought a sheep and sacrificed it on the day of *‘īd-ul-’adhā*, and then a third party appropriated it based on a proven entitlement claim to the sheep, it does not serve as the ritual sacrificial *‘udhiya* for either party. Thus, each of them is still liable to sacrifice an animal during the specified days. If the days of sacrificial slaughtering of animals pass without the buyer sacrificing another sheep, then he must give the value of an average sheep to charity. In this regard, the appropriation of the first sheep made the first purchase irrelevant, and hence needs not give the value of the purchased sheep in charity. In contrast, if a man bought a sheep for sacrificial slaughter and then sold it, he is compelled to give its value in charity. In the latter case, the buyer’s ownership of the sheep for the purpose of sacrificial slaughter was concluded and valid, and hence he must give its value in charity.

On the other hand, if the entitled party leaves the sheep to the slaughtering buyer, and only seeks compensation for its value, the slaughter requirement is fulfilled for the buyer. This ruling is in analogy to the case where a person usurps a sheep that another had bought for sacrificial slaughter, and slaughtered it on his own behalf without the owner’s permission. In the latter case, the usurper’s requirement to slaughter a sheep would be fulfilled if the owner only demanded a compensation for its value when it was alive. In this case, the usurper’s ownership of the sheep is established retroactively based on the guaranty, and hence he is considered to have slaughtered a sheep that was his property. While the usurper’s religious obligation to slaughter a sheep is satisfied thus, he is still considered a sinner, since his actions were forbidden at their inception. Hence, he still must repent and seek forgiveness for his sin of usurping the property of another. Thus ruled all the major Ḥanafī jurists with the exception of Zufar.

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.5, p.76 onwards).



## 87.2 Mālikī rulings

The Mālikīs ruled<sup>2</sup> similarly that the buyer of a sheep would have satisfied his religious duty of sacrificial slaughter if the sheep he bought and slaughtered was later proven to belong to someone other than the seller, but the latter approved the slaughter. They based this ruling on the view that the buyer would thus guarantee the sheep with the compensation he has to pay to the entitled owner, and this guaranty of the animal he sacrificed satisfied his religious obligation.

## 87.3 Shāfi'ī rulings

The Shāfi'īs ruled<sup>3</sup> that if an animal was identified and designated by intention as an animal for the ritual sacrifice (*'udhiya*), then he is required to slaughter it during the ritual sacrificial days. Then, if the animal was destroyed (and did not perish on its own), he must substitute another by buying an animal of equal value and slaughtering it during the designated period. Appropriation of the animal seems similar to its destruction in this regard.

In this regard, the if a man first established a sacrificial animal as a liability on himself, and then identified that animal, then if that animal were to perish, the majority of Shāfi'īs ruled that the liability for a sacrificed animal is restored but identified with the perished animal. In this regard, even though the perished animal ceased to exist, his guaranty thereof continued to exist.

## 87.4 Ḥanbalī rulings

The Ḥanbalīs ruled<sup>4</sup> that if a man bought an animal and identified it for sacrificial slaughter, and then the animal was appropriated based on an entitlement claim, then he must slaughter an equivalent animal. However, if the entitlement was established prior to its identification as his sacrificial slaughter, then he does not need to slaughter its equivalent, since the identification of the property of another for sacrificial slaughter is invalid.

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<sup>2</sup> Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.3, p.50).

<sup>3</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.289).

<sup>4</sup> Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.9).



Part XIV

**Debt-Clearance**  
(*Al-Muqāṣṣah*)



## Preliminaries

We shall study the debt clearance contract in four chapters:<sup>5</sup>

1. Definition and legality.
2. The object of debt clearance.
3. Types of debt clearance.
4. Legal status.

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<sup>5</sup>See the article on *muqāṣṣah* by Professor Muhammad Salām Madkūr in *Journal of Economics and Law*, issues 1 and 2 of the twenty-seventh year, and issue #4 of the twenty-ninth year.



## Chapter 88

# Definition and Legality

### 88.1 Definition

The term *muqāṣṣah* has a lexical meaning of equality. A number of juristic definitions were provided for the term:

- Ibn Juzayy<sup>1</sup> defined *muqāṣṣah* as: “The subtraction of one debt in lieu of another. This contract may involve mutual dropping of rights, a commutative transaction, or a debt transfer”.
- Al-Dardīr defined it thus:<sup>2</sup> “*muqāṣṣah* is effected when you drop what another owes you in exchange for what you owe him, subject to some conditions”. This latter definition covers debt-clearance by mutual consent, as well as a call for debt-clearance by one party that is rejected by the other.
- The Ḥanbalīs defined *muqāṣṣah* as the equality of two debts in genus, characteristics, maturity date, and amount. Thus, ‘Ibn Al-Qayyim defined it as: “The dropping of one debt in exchange for another that is equal in genus and characteristics”.<sup>3</sup> Thus, if A owed B one gold coin, and B owed A one gold coin, then the two debts may be cleared, and both creditors’ rights to demand repayment of the debts are dropped.

### 88.2 Legality

Jurists of all schools agree that clearing of debts through *muqāṣṣah* is permissible, based on the following Ḥadīth narrated on the authority of ‘Ibn ‘Umar: “I came to the Prophet (pubh), and said that I sell camels in Baqī<sup>c</sup> for a price named in gold coins, but collected in silver, and vice versa. The Prophet thus

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<sup>1</sup>Ibn Juzayy ((Mālikī), p.292).

<sup>2</sup>Al-Dardīr ((Mālikī)A, vol.3, p.227).

<sup>3</sup>Ibn Qayyim Al-Jawziyyah ((Ḥanbalī)a, vol.1, p.321).



(pbuh) said: ‘There is no harm to do so if the exchange is carried out according to the exchange rates of that day, and as long as you part without any debts between you’.<sup>4</sup> The Prophet’s statement that “there is no harm” in this transaction is proof that a price established as a liability on one party may be exchanged for another. In this regard, Al-Bābartī said in a footnote of *Fath Al-Qadīr*: “This Ḥadīth is a proof of the permissibility of *muqāṣṣah* of a fungible liability for a non-fungible, based on juristic approbation. This ruling is based on the fact that a debt cannot in fact be received, since a debt is a legal entity established as a liability on one party, and it thus cannot be made specific by identification. Hence, the receipt of debt repayment is accomplished through the receipt of an exchange, which in this case is the non-fungible. However, the ruling based on analogy would not allow this type of clearance of a debt for a non-fungible, since they are not of the same genus”.<sup>5</sup>

It is also logical to permit the clearance of debts, since it is in fact the only means by which debts can be repaid. In this regard, the Shāfi‘īs and Ḥanbalīs ruled that debt-clearance is automatically established once two equal but opposite debts are established on two parties. In this regard, mutual consent of the two debtors/creditors is not required, since it would be a waste of time for either one to demand repayment of the other’s debt.<sup>6</sup>

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<sup>4</sup>Narrated by ‘Aḥmad, and the four authors of *Sunan* on the authority of ‘Ibn ‘Umar, c.f. Al-Shawkānī (, vol.5, p.156).

<sup>5</sup>Ibn Al-Humām ((Ḥanafī), vol.5, footnote p.380 onwards).

<sup>6</sup>*Tuḥfat Al-Muḥtāj* (vol.2, p.396), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.253,257).



## Chapter 89

# The Object of Debt-Clearance

The default in a debt-clearance contract is that its object is a pair of debts. Thus, *muqāṣṣah* normally would not be applicable between two non-fungibles, or between one debt and one non-fungible.

However, we have seen that the Ḥanafis ruled that *muqāṣṣah* between a fungible liability and a non-fungible is possible. Thus, they ruled that if a creditor for ten silver coins bought a gold coin from the debtor in exchange for the liability, receiving the gold coin during the contract session, then the currency exchange contract was simultaneously a debt clearance contract.

A closer analysis of this example illustrates that the debt clearance was in fact concluded with two debts of the same genus, rather than one debt and a non-fungible of a different genus. In fact, once the creditor received the gold coin, he had it in a possession of guaranty in exchange for the agreed upon price of ten silver coins. Thus, the buyer's liability for ten silver coins after receipt was identical in genus and amount to the seller's liability, and the two debts were cleared. Consequently, while this and other examples may be conjured to argue for the clearance of a fungible liability in exchange for a non-fungible, our analysis shows that they can all be reduced in fact to the clearance of two equal debts. However, the distinction between the different cases may be made thus: Debt clearance is only obligatory for two debts, while clearance of a fungible debt for a non-fungible is permissible based on mutual consent.<sup>1</sup>

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<sup>1</sup>The article on *muqāṣṣah* by Professor Muhammad Salām Madkūr in *Journal of Economics and Law*, issues 1 and twenty-seventh year (pp.9-13).



## Chapter 90

# Types of Debt-Clearance

There are two main types of debt-clearance: permissible and impermissible. In this regard, permissible debt-clearance may be obligatory or optional.

### 90.1 Obligatory debt-clearance

If two parties have two identical corresponding debts, in genus, characteristics, amount, and date of maturity, then the two debts are automatically cleared. This type of obligatory debt-clearance is not predicated on either party making a request, or on either party's consent. Thus, if A was indebted to B for a fungible debt, and then B bought from A merchandise for a price equal to the debt, the two debts are automatically cleared as soon as the second one is established on B for the price of the merchandise. The two debts are thus cleared regardless of the parties' consent or lack thereof, and automatically without either party requesting the clearance.

The Ḥanafīs, Shāfi'īs and Ḥanbalīs permitted this type of debt clearance provided that it satisfies all of the conditions listed below.<sup>1</sup> In contrast, the Mālikīs only permitted this type of debt clearance if one party asks for it, or if both parties consent to it. Thus, most of the Mālikī definitions of *muqāṣṣah* relate to voluntary debt clearance.<sup>2</sup>

#### 90.1.1 Conditions of obligatory debt-clearance

There are four main conditions for obligatory debt-clearance:<sup>3</sup>

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<sup>1</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.250), Al-Shāfi'ī (, vol.7, p.388 onwards), *Mashrūʿ Taqnīn Al-Sharīʿah ʿalā Maḍḥhab ʿAḥmad* (item #154), Marʿī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.114), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.296 onwards).

<sup>2</sup>Al-Ḥattāb (1st edition (Mālikī), vol.4, p.549).

<sup>3</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.250), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.296,373), Marʿī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.114), Ibn Juzayy ((Mālikī), p.292), Al-Dardīr ((Mālikī)A, vol.3, p.227 onwards), *Fath Al-ʿAzīz Sharḥ Al-Wajīz* (vol.18, p.241), *Al-Anwār* (vol.2, p.528), the previously cited article on *muqāṣṣah*.



### 1. Correspondence of the two debts or rights

The two cleared rights or debts must correspond to one another, in the sense that each party is simultaneously a debtor and a creditor to the other. Thus, if a buyer is owed a debt by a principal in a selling agency, and the price is equal to the debt he is owed, the two debts cancel each other. On the other hand, the liability of a guardian or plenipotentiary of a child cannot be cleared against the debt of the young child, since the two debts do not correspond to one another in the specified manner. In contrast, the debt of woman towards a child in her custody is cleared for an equal debt that the child owes her. Finally, a debt that A owes B is not thus cleared for a debt that C owes B, since the correspondence condition is thus violated.

Moreover, it is not possible for obligatory debt clearance to be simultaneously a transfer of debt (*hawālah*). This ruling follows from the fact that the majority of jurists view the latter as a transfer of liability from the debtor to the transferee. However, if the debtor is owed an equal debt by the creditor, the two debts are automatically cleared for one another, and there is no longer a debt to be transferred. On the other hand, if the debt of the creditor to the debtor is only established after the debt of the latter was transferred to a third party, then debt clearance is not possible, since the correspondence condition is thus violated by designating the transferee as the debtor.

### 2. Equality of the two cleared debts

The two cleared debts must be of the same genus, type, characteristics, and date of maturity.<sup>4</sup> Thus, the Ḥanafīs rule that debts cannot be cleared if they differ along any of those dimensions. In contrast, the Mālikīs ruled that debt clearance can take place for debts of different genera (e.g. where one liability is for money or food, and the other is for a different non-monetary and non-edible property).

In this regard, it is well known that the Ḥanafīs, and most of the Shāfiʿīs and Ḥanbalīs consider different monies (e.g. gold and silver coins) to be of different genera. However, some of the Ḥanafī jurists argued that different monies can be considered to be of the same genus for the purpose of debt clearance. Thus, it was stated in *Al-Fatāwā Al-Zuhayriyyah*: “If two debts of different genera are cleared, e.g. if A owes B 100 golden coins and B owes A 100 silver coins, then A’s debt can be cleared in exchange for its value in gold coins, and the remainder continues to be a debt on A”.

Consequently, since fiat money has become the most common form of currency in our time, the opinion of those Ḥanafī jurists would extend to considering all currencies to be of the same genus in debt clearance. This ruling is based on the important status of convention in financial transactions, and the fact that

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<sup>4</sup>The Ḥanafīs consider a debt as a liability for a property of certain characteristics, but they do not consider a debt to be itself a property from a formal point of view. In this regard, a debt is sometimes informally discussed as a property, they argue, because it becomes property after its receipt. Consequently, a debt must be for fungibles, to ensure that it can be established as a liability with certain characteristics.



the value of money is what matters, and not the actual physical currency. On the other hand, the Shāfi'īs and Ḥanbalīs ruled that fiat monies are considered to be of different genera, in analogy to treating silver and gold coins as two different genera. Thus, they do not allow the clearance of two debts if one is in gold and the other is in silver, due to the difference in genus.

The Ḥanafīs and Ḥanbalīs also required the two cleared debts to have the same characteristics, as they pertain to value and usage.

Moreover, the Ḥanafīs ruled that obligatory debt clearance is only legalized for matured debts. Thus, if either debt was deferred, they do not allow obligatory debt clearance, even if the two dates had the same maturity date. In contrast, the Shāfi'īs and Ḥanbalīs ruled that the two debts must have the same date of maturity if they are deferred, or they must both be matured at the time of debt-clearance.

On the other hand, the Mālikīs ruled that debt clearance is valid if the two debts have the same date of maturity. However, they ruled that the debt clearance is not permissible if either of the two debts was deferred and they were for different genera (e.g. one debt in gold and the other in silver). But if both debts were of the same monetary genus (e.g. both gold or both silver), the debt clearance is valid if both are matured. Moreover, most of the Mālikīs ruled that the debt clearance is permissible even if either of the two debts of the same monetary genus (gold or silver) was deferred. The latter majority opinion is based on the view that debt clearance is a mutual dropping of rights to clear the debtors' liabilities. They further argued that such debt clearance is free of any suspicion of *ribā*.

However, if the two debts were of the same genus but were both foodstuffs, then the Mālikī rulings depend on the origin of the debts. Thus, they permit clearance of debts for foodstuffs if they originated from loans, regardless of the dates of maturity. On the other hand, they ruled that the debt clearance is impermissible if the debts for foodstuffs originated from sales, regardless of the maturity dates. The second ruling is based on the prohibition of selling foodstuffs prior to receiving them. Finally, the Mālikīs ruled that if both debts were of the same genus, and were neither monetary nor foodstuffs, then debt clearance is permissible regardless of maturity dates.

Jurists also required for debt clearance that the underlying properties of the two debts have the same quality. Thus, if one debt was for high quality goods and the other for low quality goods, they do not allow the two debts to be cleared. Furthermore, the Ḥanafīs required the two debts to share in strength. For instance, a debt for a wife's alimony cannot be cleared for a debt on the wife unless they clear them with mutual consent. This ruling is based on their view that the debt for alimony is weaker than other debts. In contrast, the Mālikīs, Shāfi'īs and Ḥanbalīs did not consider the respective strengths of the two debts to be a factor in the validity of debt clearance.

The Ḥanafīs, Shāfi'īs and Ḥanbalīs also argued that the two debts can only be cleared automatically if the underlying goods are similar in marketability and market value. Thus, they do not permit an automatic clearance of one debt for good silver coins and another for broken silver coins that cannot be redeemed



from the treasury.<sup>5</sup>

In general, two debts can be cleared even if they had different origins. Thus, it is permissible to clear one debt that originated from a loan for another that originated from a sale. Moreover, it is not a requirement in debt clearance that the origins of both debts are legitimate. For instance, it is permissible to clear a debt that originated from a valid sale for a debt that originated from a forbidden usurping or destruction of another's property. In this regard, the reason for the debt is irrelevant, and once both debts are established, they can be cleared regardless of origin.

### 3. The no-harm clause

Obligatory debt clearance must have no adverse consequences for any party, otherwise it is not legalized. Thus, the Ḥanbalīs ruled:<sup>6</sup> “If a woman is entitled to alimony payments, and owes a debt of the same genus, then the two debts are not cleared if the woman is in need of the alimony payment. This ruling follows from the fact that alimony payments are more important than debt repayment. Thus, debt clearance is not allowed if it harms one of the debtors”.

Similarly, the expenses for burial have a higher priority over debts. Thus, if a debtor sold part of the estate of a deceased person to his creditor, and the property was of the same genus as the debt, the two debts are not cleared. This ruling is intended to protect the rights of the deceased, and to ensure that debt clearance does not harm the debtor.

Moreover, debts insured with a pawned property have a higher priority for extracting repayment from the pawned property. Thus, if the pawning debtor sold the pawned property to another creditor, and if the price is of the same genus as the second debt, the second debt is not cleared with liability for the price. This ruling is made to protect the rights of the creditor to whom the property was pawned.

We have thus seen that debt clearance is not allowed if it results in a financial harm to the debtor or to a person who has a right associated with sold property. It is also true that debt clearance is not allowed if it results in a financial harm to any of the other creditors. Thus jurists with the exception of 'Abū Ḥanīfa ruled that a judge may forbid a bankrupt debtor from dealing in his property upon the request of his creditors. Thus, the judge may forbid him from selling his property below the market price, acknowledging any other debts, or otherwise engaging in any financial dealings. The judge would rule thus to protect the rights of the creditors.

In summary, it is not permissible to clear two debts if a third party has a right attached to either one. Thus, the right of a creditor to whom the debtor's property was pawned prevents the clearance of another debt for the price of the pawned property. In the other example, the rights of all other creditors prevent the bankrupt debtor from selling any of his property to one creditor in exchange for his debt to that creditor. In both cases, one or more creditors have a right

<sup>5</sup>Ibn Al-Humām ((Ḥanafī), vol.5, p.381).

<sup>6</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.297).



associated with the pawned or sold property, and thus the debt clearance is not allowed.

On the other hand, if a non-bankrupt debtor sold his property to repay one of his creditors, but the selling debtor was indebted to the buyer for a debt of the same genus as the price, then the mutual debts of the buyer and seller must be cleared. This follows from the fact that the dealings of unrestricted debtors are executed, and thus the debtor is permitted to repay some of his creditors before others. Even if the non-bankrupt debtor was otherwise restricted from financial dealings, there is usually no impediment to selling his property, or to the clearance of his debt for the price owed by the buyer if that buyer was not a creditor to whom that property was pawned.

#### 4. Avoidance of prohibitions

Obligatory debt clearance may only take place if it does not result in forbidden actions such as parting prior to receiving the price of a *salam*, or dealing in object of *salam* prior to receipt. Other legal requirements like mutual receipt in currency exchange contracts must also be observed, and the majority of jurists did not allow clearance of debts that can result in reduction of a debt being tied to speeding up its payment.

#### 90.1.2 Voluntary debt clearance

Jurists permit debt clearance by mutual consent, regardless of unity of genus and characteristics, etc., provided that it does not result in a forbidden transaction.

#### 90.1.3 Forbidden debt clearance

Debt clearance is not permissible if it violates any of its conditions. For instance, debt clearance that results in a violation of any Islamic laws is forbidden. We shall list some examples of such forbidden debt clearances in currency exchange contracts, *salam* contracts, and any transaction that is suspiciously similar to *ribā*. In those examples below, the debt clearance is forbidden regardless of the debtors' consent.

##### 1. Currency exchange

The debt clearance is invalid if it is conducted between the two sides of a currency exchange contract after its session. This ruling follows from the fact that the currency exchange is itself invalid if both compensations were not paid during the session. Hence, no debt is established by virtue of that contract, and the debt clearance is invalid since at least one of the two debts is not established. Otherwise, a debt clearance is valid during the session, regardless of whether one of the compensations was established through a guaranteed receipt during



the contract session, before or after. In what follows, we shall discuss each of the possibilities in some detail: .<sup>7</sup>

- It is permissible for two individuals to engage in a currency exchange program appended to a prior debt. Thus, if one man owed another ten silver coins, the debtor may sell the creditor one gold coin in exchange for his liability. Thus, by appending the contract to that debt, the contract results automatically in clearing the two debts, without being predicated on their consent. This ruling is based on the consensus that the price of the gold coin can be named as silver coins that are not necessary to receive or to be identified through receipt during the contract session. In this regard, the condition of identification through receipt in currency exchange is put in place to avoid the possibility of deferment *ribā*. However, there can be no *ribā* in dropping a debt, since the possibility of *ribā* is restricted to debts whose consequences are yet to be known. Consequently, a currency exchange wherein a debt for silver coins is exchanged (or cleared) for a debt for gold coins, the exchange is valid since both debts are thus dropped, and there is no danger of *ribā*.
- Ḥanafī jurists ruled by juristic approbation that it is permissible for the debtor who owes ten silver coins to sell the creditor a gold coin for ten silver coins, without identifying them with his debt, and then to clear the two debts for silver coins after the creditor receives the gold coin.<sup>8</sup> They ruled thus that receipt voids the first contract, and append a new exchange contract to the debt. In other words, once the consequences of the contract are altered, the currency exchange contract is voided, and the new contract replaces it, in analogy to the case where a sale is renewed at a higher price (and thus voided and replaced by another sale). Thus, by clearing the two debts, the currency exchange contract is voided, and replaced by the debt clearance contract appended to the existing debt.

Both cases considered so far pertain to the clearing of an existing debt.

- There are two opinions in the Ḥanafī school pertaining to clearance of debts that ensue after the currency exchange. The majority opinion is that such debt clearance is permissible. Thus, if one party sells another one golden coin for ten silver coins, and then the buyer of the gold coin sells the other party a dress for ten silver coins and delivers the dress during the same contract session, then they may clear the two debts for ten silver coins during that session. The ruling is based on the view that the first currency exchange contract was thus voided and replaced by the debt clearance contract.

<sup>7</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.19 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.379 onwards), Al-Kāsānī ((Ḥanafī), vol.5, pp.206,218), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.249 onwards).

<sup>8</sup>Zufar ruled by analogy that this contract is not permissible, since he viewed it as exchanging a compensation in a currency exchange contract prior to its receipt.



- If specific coins were exchanged for unspecified ones during a currency exchange contract, and then the creditor became indebted to the debtor during the same session due to a guaranteed receipt, then the debts are cleared automatically regardless of consent. The second debt may be established in this case if the creditor borrows the equivalent of the price during the session or usurps it from the debtor, in which case receipt and the currency exchange contract is considered concluded, and then followed by the debt clearance.

Note that in all but the first of those cases, the debt clearance must take place during the currency exchange contract session. Otherwise, if the currency exchange session ends first, the contract is invalidated, and the debts to be cleared are not considered to be established.

## 2. The price of *salam*

According to all Ḥanafī books with the exception of *Al-Badā'ir*, the Ḥanafīs agree with the Shāfi'īs and Ḥanbalīs that it is not permissible to clear the price of *salam* with any other debt.<sup>9</sup> This ruling applies regardless of whether the debt preceded or followed the *salam* contract, and regardless of the parties' consent. The ruling is based on the view that such debt clearance would be tantamount to dealing in the price of *salam* prior to receiving it, which is invalid since that price must be received in full during the *salam* contract session.

## 3. The object of *salam*

It is also not permissible to clear a debt for the liability for an object of *salam*, as shown in Muḥammad's *Al-'Aṣl*.<sup>10</sup> Thus, if two people engaged in two *salam* contracts, whereby each owed the other a volume of wheat of the same or different type, and the same delivery date, the two liabilities may not be cleared. This ruling is based on the view that such clearance would be tantamount to selling that which they had not yet received. In this regard, the buyer in each of the *salam* contracts was only permitted to take either the wheat or the price he paid for it, but neither is allowed to take a debt in lieu of the object of *salam*.

Moreover, if the first contract was a *salam* and the later one was a matured loan, then the two debts may not be cleared, since they are not equal. The inequality in this case arises because one compensation is matured (and therefore more valuable) and the other is deferred. However, on the date of delivery specified in the *salam* contract, the two debts will be matured, and thus may be cleared for one another. On the other hand, if the loan contract preceded the *salam* contract, the two resulting debts may not be cleared for one another, regardless of the parties' consent.

<sup>9</sup>Ibn Al-Humām ((Ḥanafī), vol.4, p.140), *Al-'Anwār* (vol.1, p.265), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.296 onwards).

<sup>10</sup>Al-Sarakḥsī (1st edition (Ḥanafī), vol.12, p.168).



#### 4. The price of a voided *salam*

The legal status of the price of a voided *salam* is the same as that of the object of *salam*. Thus, since debt clearance of the latter is not allowed (as a movable object of sale that cannot be resold prior to receipt), it is not allowed for the former. Thus, if a *salam* contract is voided, the buyer is not allowed to use the *salam* price for buying anything else from the seller until he receives it back in full.<sup>11</sup> This ruling is based on the Ḥadīth: “Do not take anything other than the object of your *salam* or a refund of its price” (if it is voided).<sup>12</sup> Thus, since what the buyer is entitled to the *salam* object of sale, or the price refund as a replacement thereof, dealing in the object of the price prior to their receipt is forbidden in analogy to dealing in the object of sale prior to its receipt.

#### 5. Suspicion of *ribā*

All jurists have agreed on the prohibition of any transaction suspiciously similar to *ribā*. Thus, they established the juristic rule that any loan that benefits the lender is forbidden *ribā*, and they used the rule of avoidance of means for circumventing the law (*sadd al-dhārāʿi*) to varying degrees in this regard. Consequently, they ruled that debt clearance contracts that can lead to any degree of *ribā* are forbidden.

Examples of such contracts were provided by the Mālikīs under the title of deferred sales.<sup>13</sup> Thus, if A sold B ten measures of food with a deferred price of ten coins, and then after the food was consumed, B sold A twenty measures of the same type of food for ten coins, it is not permissible to clear the two debts for ten coins each. In this case, the two prices cancel each other out, but A in fact sold B ten measures of food that he consumed and repaid with twenty measures of the same food. That is a loan that benefited the lender, and it is forbidden *ribā*.

<sup>11</sup>Ibn Al-Humām ((Ḥanafī), vol.5, p.345).

<sup>12</sup>Narrated by ʿAbdul-Razzāq on the authority of ʿIbn ʿUmar, ʿIbn ʿAbī Shaybah on the authority of ʿAbdullāh ibn ʿAmr, and by ʿAbū Dāwūd and ʿIbn Mājah with a complete chain of narrators on the authority of ʿAbū Saʿīd Al-Khudriy as follows: “The buyer in a *salam* may not take another good in place of its object”, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.51).

<sup>13</sup>*Sharḥ Al-Risālah* (vol.2, p.140).



## Chapter 91

# Consequences of Debt-Clearance

The effect of clearing two debts is dropping both of them. However, each of the debts in this case is in a sense dropped by repayment, i.e. both debts are dropped with the compensation of dropping the other debt. This type of mutual dropping is similar to divorce in exchange for absolution of all responsibilities, where both parties mutually drop their respective rights as a form of exchange. Thus, the Mālikīs said that the objective of debt clearance is an exchange that results in absolution of both parties. The Ḥanafīs went further by saying that debt clearance involves a form of debt repayment, and in fact repayment can only take place through the clearance of debts. In this regard, the Ḥanafīs ruled that the mutual dropping of rights is obligatory, even in debt clearance that requires mutual consent.

However, jurists differed in opinion regarding the dropped right in debt clearance, some arguing that the debt itself is dropped and others arguing that only the right to demand repayment is dropped:

- The non-Ḥanafīs ruled that debt clearance drops both debts if they are equal, and drops the lesser of the two if they are unequal. Thus, the absolution resulting from debt clearance is in their view a dropping absolution not merely absolution of the liability to be asked for repayment.
- In contrast, the Ḥanafīs ruled that debt clearance only drops the right to demand repayment, but does not drop the debt itself. Thus, they ruled that the debts continue to exist as liabilities after the debt clearance, even though the creditor is no longer entitled to demand repayment. In this regard, they argued that the liability is similar to rights that are disregarded in court due to the elapsing of their statute of limitations.

Thus, they ruled that it is possible after the clearance of debts to absolve them with a dropping absolution, give them as a gift, or reduce them.



Thus, if a person had volunteered to repay a debt, and then the creditor offered the debtor a dropping absolution, the Ḥanafis ruled that the volunteer may thus seek compensation from the debtor.

However, this is a strange and unjust ruling since the debtor clearly repays his debt, or clears it with another debt, to clear his liability completely, and not just to negate the creditor's right to demand repayment. Moreover, when a debt is repaid with specific goods, the repayment is clearly superior to the debt, since the latter is not guaranteed. Thus, justice dictates that a debt should be terminated once it is repaid with such goods. Even if we follow the Ḥanafī logic and say that debt repayment establishes a liability on the receiving creditor for an equal debt, why would one argue that the two debts will only cancel each other in terms of the right to demand repayment. Why, in other words, would we not rule that the debts themselves cancel each other out?<sup>1</sup>

## 91.1 Voiding debt clearance contracts

If a debt clearance contract is concluded in a valid form, then it cannot be voided voluntarily or otherwise. This ruling follows from the fact that a valid debt clearance drops the two debts, and there is no way to reinstate such dropped debts.

However, it may be possible after the conclusion of a valid debt clearance contract that one of the parties loses the right for full repayment of his part in the clearance contract, or any repayment thereof. In the first case, the clearance is diminished by an amount corresponding to the diminution in the contracting party's right, and in the latter case the contract is voided. In what follows, we shall give some examples of the two cases:

- Case 1: If a man borrowed \$1000, and then he sold his lender a property for a deferred price of \$1000, then if the borrower falls sick and has other debts, his debt for \$1000 is cleared for his deferred credit of \$1000 once at the deferment date. However, if the borrower died because of the same illness, then his other creditors would share in the \$1000 credit that the lender owed to him. In other words, a full clearance for \$1000 would take place if the borrower recovered from his illness, and the other creditors have no right to protest. However, if he died from the same illness, the creditors can thus claim that he was in fact terminally ill, and that they had a right in his property during his terminal illness, established retroactively. Thus, the lender must share equally with the other creditors. In other words, the debt clearance that was concluded in a valid manner by the deceased is thus partially invalidated after his death, for the difference between \$1000 and the actual share of the lender in his estate.

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<sup>1</sup>The article on *muqāṣṣah* by Professor Salām Madkūr in *Majallat Al-Qānūn*, fourth issue of the twenty-ninth year (p.34).



- Case 2: If a buying agent owed his principal a debt, the buyer's liability for the price is cleared with that debt. However, if the agent kept the merchandise until it perished in his possession, the debt clearance is thus invalidated. This ruling is based on the view that the sale was voided once the object of sale perished prior to receipt, and hence there was no liability for the price to be cleared against the buying agent's debt.



**Part XV**

**Coercion (*Al-'Ikrāh*)**



## Preliminaries

We shall study coercion in four chapters:<sup>2</sup>

1. Nature and types.
2. Conditions.
3. Consequences in physical dealings.
4. Consequences in legal dealings.

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<sup>2</sup>There is some overlap and similarity between coercion and interdiction of someone's dealings (*hajr*), since both involve the negation of a person's authorization and freedom choice in his dealings, c.f. 'Ibn Al-Humām ((Ḥanafī), vol.7, p.309).



## Chapter 92

# Nature and types

### 92.1 The nature of coercion

Coercion refers literally to forcing another to accept what he would not otherwise. In other words, it negates the coerced party's consent. In this regard, Allāh (swt) compares liking (*ḥubb*) or consenting to something on the one hand with hating (*kurh*) or being coerced in some sense in the verse: "But it is possible that you dislike a thing that is good for you, and that you love a thing that is bad for you" [2:216].

The juristic definition of coercion is: "Forcing another to perform an act to which he does not consent, and that he would not have performed if left to his own devices". In this regard, Al-Sarakḥsī defined coercion as: "An act that one man performs towards another, by means of which the consent and freedom of choice of the latter is negated". In this regard, the jurists distinguish between consent (*al-riḍā*), which is willingness to do something and liking it, and choice (*al-'ikhtiyār*), which is selecting one action out of a set of possible actions.

The Ḥanafīs distinguished between two main types of coercion: total (*muljī*) and partial (*nāqīṣ*):

- Coercion is total if the coerced party has no ability to make a choice or act in a different manner. For instance, if a person is threatened that he will be harmed physically (by beating, killing, breaking of limbs, etc.) if he does not comply with an order, he is considered to be totally coerced. This type of coercion negates the consent of the coerced party, and renders his choices defective.
- On the other hand, coercion through threats that fall short of harming the coerced party physically (e.g. threats of incarceration or light beating) are considered partial. Legally, this type of coercion negates the coerced party's consent, but does not render his choices defective.<sup>1</sup>

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.175), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.292 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.181), Kḥusrū (1304H (Ḥanafī), vol.2, p.269 onwards),



There is also a third weaker type of coercion, which the Ḥanafis labeled virtual coercion (*al-'ikrāh al-'adabī*). This type of coercion also negates consent but does not void the coerced party's choices. It takes effect if the coerced party is threatened with the incarceration of a parent, child, sibling, etc. As stated by the Ḥanafī jurist Al-Kamāl ibn Al-Humām, this type of coercion is considered a legal coercion based on juristic approbation, in opposition to its status based on analogy.

This third type of coercion renders the coerced party's dealings non-executable.<sup>2</sup>

In contrast, Al-'Imām Al-Shāfi'ī recognized only total coercion, ruling that its partial counterpart cannot be given the legal status of coercion. Thus, the Shāfi'īs ruled: "A person is coerced if he is threatened with severe beating, prolonged incarceration, or the destruction of his property". They further ruled that the consequences of coercion depend on the circumstances. Thus, they do not recognize a threat of future harm (e.g. "I shall beat you tomorrow, unless . . .") to be coercion. Moreover, threats of applying legal penalties (e.g. a person with a right of physical retribution against a killer saying "Do such and such, otherwise I shall have my retribution") is not considered coercion. Moreover, they stipulated a condition that the threat does not qualify as coercion unless the coercing party's threat is viable, and that the coerced party is unable to avoid the threatened harm in any way other than doing what the coercer demanded of him. In this regard, the dealings of a person who is coerced unlawfully are not executed, while those who are liable for a legal punishment are punished thus.<sup>3</sup>

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<sup>1</sup>Tbn 'Ābidīn ((Ḥanafī), vol.5, p.88 onwards), *Al-Wasīṭ fī 'Uṣūl Al-Fiqh Al-'Islāmī* by Dr. Al-Zuhaylī (p.185 onwards), Al-Dardīr ((Mālikī)B, vol.2, p.546 onwards).

<sup>2</sup>See the article *Al-'Ikrah Bayna Al-Sharī'ah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (p.372).

<sup>3</sup>*Tuḥfat Al-Ṭullāb* by Al-'Anṣārī (p.272). This appears to be the opinion of the Mālikīs and Ḥanbalīs as well.



## Chapter 93

# Coercion Conditions

There are eleven conditions that must be satisfied for coercion to be established:

1. The coercer must be capable to follow through on his threats. Thus, 'Abū Ḥanīfa ruled that only the ruler can coerce, since others are not capable of following through with their threats. In contrast, 'Abū Yūsuf, Muḥammad, 'Al-Shāfi'ī, Mālik and 'Aḥmad ruled that the ruler as well as other parties may be coercers, since physical harm to the coerced party may be caused by any number of able people.

The difference in opinion between 'Abū Ḥanīfa on the one hand and 'Abū Yūsuf and Muḥammad on the other is primarily a difference based on the circumstances under which they lived, rather than a difference in their juristic sources and methods. Thus, 'Abū Ḥanīfa's ruling was valid for his time, but circumstances changed thereafter and dictated a change in the juristic ruling. Al-Baghdādī summarized the later Ḥanafī position thus: "The legal status of coercion is established if a viable threat is issued by a capable coercer, regardless of whether the coercer is the ruler or another party".<sup>1</sup>

2. The coerced party must be convinced that the coercer will most likely follow through with his threats if he does not comply, and must be unable to protect himself from the threat by escaping, seeking help, or personal resistance.
3. The threat underlying coercion must involve the destruction of the life, limb, or property of a close relative (e.g. the coerced party himself, his wife, his parents, etc.), or some other hurtful action. In this regard, while some people are only hurt if beaten heavily, others can be severely hurt with harsh language.
4. The coerced action must be one that the coerced party would not have performed if he was not coerced. This includes actions that pertain to his

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<sup>1</sup> *Majma' Al-Damānāt* (p.204).



own right (e.g. selling his property), the rights of others (e.g. destroying the property of another), or the rights of the Law (e.g. imbibing wine or committing adultery).

5. The threat must be considered worse than the coerced action. Thus, if a person is threatened with a slap on the face if he does not destroy the property of another, and if he considers a slap on the face to be less serious than the destruction of another's property, he is not considered to be coerced.
6. Performance of the coerced action must imply safety from the threat. Thus, the non-Ḥanbalīs and most of the Ḥanbalīs ruled that a person is not coerced if he is told: "Kill yourself, otherwise I shall kill you". This ruling is based on the fact that obeying the first order does not free him from being killed, and hence he cannot be considered a coerced party if he does kill himself.
7. The Ḥanafīs, Shāfi'īs, and some of the Ḥanbalīs ruled that the threat must be for immediate punishment. In this regard, the threat of a future punishment allows the threatened party room to seek the protection of the state and other individuals. In contrast, the Mālikīs ruled that the threat may be for future punishment, as long as the fear of that punishment is immediate. The Mālikī opinion to be the most appropriate in this case.
8. The Shāfi'īs and Mālikīs ruled that only the actions ordered by the coercer are subject to the legal status of coerced actions. Thus, if the coerced party's action exceeds, falls short of, or is different from the coercer's demand, his action is executed and not considered coerced. For example, if a person is coerced to divorce his wife once, and he divorced her thrice, or vice versa, his action is executed and not considered coerced. Similarly, if he is coerced to divorce his wife, but he sells his house instead, the action is not considered coerced, and thus deemed executed.

On the other hand, the Ḥanafīs and Ḥanbalīs ruled that if the coerced party performs less than what he was ordered to do by the coercer, he is considered to be coerced. However, they agree with the Mālikīs and Shāfi'īs that he is not considered coerced if his actions exceeded or differed from those ordered by the coercer.

9. The Shāfi'īs ruled that an action is considered coerced only if it was clearly identified in the order of the coercer. Thus, if a person is coerced to divorce one of his two wives or kill one of two people, without specifying which one, whichever action he takes is not considered coerced. However, if the person is named, then he is considered to be coerced.

On the other hand, the Ḥanafīs, Mālikīs and Ḥanbalīs ruled in the case of coercion to perform one of two actions, without specifying which, that either action taken by the coerced party is considered legally to be a coerced action. This seems to be the most appropriate opinion.



10. The Ḥanafīs and later Shāfi'īs ruled that an action is not considered coerced if the threat involved the coercer exercising a legal right of his, and the ordered action would give him something that is not his right or the coerced party's obligation. For instance, they ruled that threatening a wife to divorce her if she does not absolve him of her debt is not considered coercion. However, some of them ruled that this is indeed considered coercion since the husband has authority over his wife, and thus this threat results in coercion.

'Imām 'Aḥmad did not consider this to be a condition for coercion. Thus, he allows coercion to take place where the coercer threatens to use a legal right of his.<sup>2</sup> This seems to be the most logical opinion.

11. The action must not be an obligation of the coerced party in order to be considered legally a coerced action. For instance, threatening a bankrupt person of selling his property, threatening a killer of execution, and threatening a person who had sworn never to touch his wife with divorce, are not considered instances of coercion.

In summary, the Shāfi'īs and Ḥanbalīs agreed on three conditions for coercion:

1. The coercer's ability to follow-through with his threat.
2. The coerced party's inability to avoid the threatened harm, and being convinced that the coercer will follow through with his threat if he does not comply.
3. The threatened harm must be major, e.g. loss of life, severe beating, prolonged incarceration, loss of property, etc. However, they did not consider a threat of verbal abuse to be a valid threat in coercion.

The Shāfi'īs further ruled that the coercer must have no legal right to perform the threatened action.

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<sup>2</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.176), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.293), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.107), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.182), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.89 onwards), the article *Al-'Ikrāh Bayna Al-Sharī'ah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (p.7 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.3, p.289 onwards), 'Ibn Qudāmah (, vol.7, p.120), 'Ibn Juzayy ((Mālikī), p.227 onwards).



## Chapter 94

# Coerced Physical Actions

A coercion may be for taking or avoiding a physical action or a legal action, and the coerced action may be uniquely identified or specified as an unidentified member of a set of actions. In this regard, coercion of identified physical actions has two sets of consequences pertaining to this life and the hereafter.

### 94.1 Rulings for the hereafter

The consequences of coerced physical actions for the hereafter vary according to the nature of the action. In this regard, we distinguish between three types of physical actions: (1) permissible (*mubāḥ*) based on coercion, (2) allowed (*murakḥḥaṣṣ*) with a license based on coercion, and (3) forbidden. In what follows, we shall discuss the legal status of coerced physical actions of each type in some detail.

#### 94.1.1 Permissibility due to coercion

Actions under this category include eating forbidden meats such as dead animals, blood, and pork, as well as drinking otherwise forbidden wine. The legal status of such actions depends on the type of coercion. Thus, total coercion with a threat to life and limb render such actions permissible based on coercion. Proof for this ruling is provided in the verse: "...except under compulsion of necessity" [6:119]. In this regard, if the coerced party refused to act and was killed by the coercer, he is responsible before Allāh for not preventing his death, for which he was ordered in the verse: "...and make not your own hands contribute to your destruction" [2:195].

On the other hand, such actions are not rendered permissible and are not licensed if the coercion was partial, i.e. if the threat was merely for incarceration or light beating. Thus, performing the ordered actions in such partial coercion is considered a sin, since the actor should give the rights of Allāh (swt) a higher



priority than his own rights.<sup>1</sup> Thus, the consumption of such forbidden foods and drinks are only rendered permissible for persons under a total coercion.

### 94.1.2 Licentious allowance due to coercion

Actions under this category include declaring disbelief with a believing heart, cursing the Prophet (pbuh), praying at the cross, and the destruction of a Muslim's property. Such actions are never made permissible, but a totally coerced person is given a license to commit them. However, if the coerced person persists in refusing to commit such actions and is killed due to his resistance, he is credited for having died while striving in the way of Allāh (*jihād*). The latter ruling follows from the fact that such actions remain forbidden, even though a license is issued to one who is threatened with a loss of life, limb, or property.

The non-Mālikīs and Ṣāḥirīs based this license in the case of total coercion on the verse: "Anyone who, after accepting faith in Allāh, utters disbelief, except under coercion with his heart remaining firm in faith, but those who open their breast to disbelief, on them is wrath from Allāh, and theirs will be a dreadful penalty" [16:106]. In contrast, the Mālikīs only allowed expressing disbelief with the tongue if the person is threatened with death. However, they did not consider threats of cutting the person's limbs to be sufficient for issuing such a license.

On the other hand, the Ḥanafīs and Mālikīs do not allow the coerced a license to perform such actions if the coercion is incomplete. If a Muslim commits such actions based on compliance with an incomplete coercion, he is deemed to be an unbeliever, even if he continued to profess faith in his heart. In contrast, the Ṣāḥifīs, Ḥanbalīs, and Ṣāḥirīs allowed a license to the incompletely coerced Muslim to express disbelief with his tongue. They based this ruling on the fact that many of the instances of coercion in early Islam were incomplete. Thus, the latter ruling seems to be more appropriate.

In general, it is clearly better to refuse expressing disbelief. As proof, one might refer to the narration that Musaylama the Liar took two of the Prophet's (pbuh) companions as hostages. He asked one of them: "What do you call Muḥammad?", the companion said: "The Messenger of Allāh". Musaylama then asked him: "And what do you call me?", and he answered "you too", and thus he was released. When the second companion was asked, he professed that the Prophet (pbuh) is the Messenger of Allāh, but when asked what he called Musaylama, he professed three time that he did not hear the second question. Consequently, Musaylama killed the second companion. When the Prophet (pbuh) heard of the incident, he (pbuh) said: "The first one took a licentious allowance. The second, on the other hand, insisted to say nothing but Truth, and he has indeed won a great deal".<sup>2</sup>

<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.176), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.185), 'Ibn ʿAbidīn ((Ḥanafī), vol.5, p.92), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.7, p.198), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.110).

<sup>2</sup> *Tafsīr Al-Qurṭubī* (vol.10, p.189), 'Ibn Ḥajar (, p.371).



Moreover, there is proof of a licentious allowance of cursing the Prophet (pbuh) under coercion, based on the narration regarding ʿAmmār ibn Yāsir (mAbpwt). He was coerced by the unbelievers to curse the Prophet (pbuh), and returned with great sadness. When the Prophet (pbuh) saw him, he asked him: “What is upsetting you ʿAmmār?”. He answered: “A great evil, O Messenger of Allāh; they did not let me go until I cursed you”. The Prophet (pbuh) then said: “If they force you again, do it again”.<sup>3</sup>

On the other hand, there is proof that if the coerced person refuses to curse the Prophet (pbuh) and dies consequently, he is rewarded for it. The proof is provided by the story of Khubayb, who was taken hostage by the unbelievers and sold in Makkah. He was then tortured repeatedly to praise the Meccan idols and curse the Prophet (pbuh), but he persisted in cursing their idols and praising the Prophet (pbuh). When they gave up on him, they decided to kill him. He then asked them to pray two *rakʿas*, and did not prolong them so that the unbelievers will not think that he was afraid of death. Finally, he asked them to kill him while his forehead was on the ground, in a state of prostration before Allāh, but they refused that request. Thus, he raised his hands to the sky, and prayed: “O Allāh, I see only the faces of enemies, so send my *salām* to the Prophet (pubh)”. He then prayed: “O Allāh, encompass them all with Your Power, disperse them and take their powers, and then let not one of them survive Your Wrath”. He then recited a verse of poetry: “As long as I die as a Muslim; I care not in what manner I am killed”. Then, when they killed him and crucified him, his face turned towards the *qiblah*. The Prophet said about him: “He is the master of all martyrs, and he is my companion in paradise”.<sup>4</sup>

This Ḥadīth provides ample proof that it is better to desist from cursing the Prophet (pbuh), even under extreme coercion.<sup>5</sup>

Moreover, a licentious allowance is given to destroy the property of a Muslim if one is totally coerced. This ruling is based on the permissibility of taking and destroying the property of another in cases of necessity, and total coercion is a form of necessity. However, the licentious allowance means that the coerced party is absolved of his sin on the day of judgment, but does not drop the prohibition of destroying the property of another Muslim. Indeed, that prohibition is established irrevocably by the Ḥadīth: “A Muslim is forbidden from trans-

<sup>3</sup>Narrated by Al-Ḥākim, Al-Bayhaqī, Ibn ʿAbī Shaybah, ʿAbū Nuʿaym, ʿAbdul-Razzāq, and ʿIshāq ibn Rāhawīh. Al-Ḥākim further ruled that the Ḥadīth is valid according to the criteria of Al-Bukhārī and Muslim, even though they did not narrate it, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.158).

<sup>4</sup>The story of his martyrdom was narrated by ʿAḥmad, Al-Bukhārī, ʿAbū Dāwūd, and Al-Nasāʾī on the authority of ʿAbū Hurayrah, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.159), Al-Shawkānī (, vol.7, p.253 onwards). The statement of the Prophet “He is the master of all martyrs, . . .” is a strange Ḥadīth as Al-Zaylaʿī stated, since we know from the Ḥadīth of Al-Ḥākim that Ḥamzah (mAbpwh) is the master of all martyrs.

<sup>5</sup>Al-Kāsānī ((Ḥanafī), ibid., p.176 onwards), Ibn Al-Humām ((Ḥanafī), ibid., p.299), Al-Zaylaʿī ((Ḥanafī Jurisprudence), ibid., p.186), Ibn ʿĀbidīn ((Ḥanafī), ibid., p.93), ʿAbd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.4, p.110), *Al-Muwāfaqāt* (vol.1, p.325), Al-Zuhaylī’s *ʿUṣūl Al-Fiqh* (vol.1, p.113), Al-Qāḍī ʿIyād’s *Al-Shifāʾ*, and the article *Al-ʿIkrāh Bayna Al-Sharʿah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (p.59 onwards).



gressing against another Muslim's life, property, or honor".<sup>6</sup> In this context, the Ḥanafīs, Shāfi'īs and most of the Ḥanbalīs ruled that the types of destruction of another's property thus allowed for a totally coerced person includes burning the property, and similar means of its destruction.

In contrast, the Mālikīs and Zāhirīs did not recognize a licentious allowance to burn the property of another, since the rights of the owner are thus harmed.<sup>7</sup> This ruling is based on the Legislator's prohibition of harming others, as expressed explicitly in the Prophet's (pbuh) Ḥadīth: "Do not harm other Muslims (*lā ḍarara wa lā ḍirār*)".<sup>8</sup>

One exceptional case is that of coercion to accept Islam. Such coercion is Legally forbidden. However, if it does take place, the coerced Islam is considered valid, and he receives the same treatment as all other Muslims. This ruling follows from the fact that this type of coercion is for the benefit of the coerced from the point of view of the True religion of Islam.

### 94.1.3 Forbidden actions

It is forbidden to kill a Muslim or cut any part of his body, no matter how small, regardless of coercion. This ruling follows from the fact that murder is a pure forbidden evil, forbidden in the verse: "Nor take life which Allāh has made sacred except for a just cause" [17:33]. Further, harming a Muslim physically short of killing him is also forbidden by the verse: "And those who harm believing men and women undeservedly bear on themselves a calumny and a glaring sin" [33:58]. Thus, everyone is prohibited from killing or harming a Muslim physically, regardless of whether or not he is coerced totally or partially.

Another example of actions that are forbidden regardless of coercion is physical violence against one's parents. In this regard, the verse: "Say not to them a word of contempt, nor repel them" [17:23] clearly forbids transgressions that are much less than physical violence. Thus, inflicting any physical pain on the parents is forbidden regardless of coercion.

A third example is adultery, which can never be deemed permissible or allowed for a man with or without coercion. The prohibition of adultery is logically established from the verse: "Nor come near to adultery, for it is shameful and evil, opening the road to other evils" [17:32]. Al-Kasānī also chose the opinion that no woman is allowed to commit adultery, even under total coercion.<sup>9</sup>

<sup>6</sup>Narrated by Muslim on the authority of 'Abū Hurayrah, c.f. *Al-'Arba'īn Al-Nawawīyyah* (p.76 onwards).

<sup>7</sup>Ibn Al-Humām ((Ḥanafī), vol.7, p.302), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.93), the article *Al-'Ikrāh Bayna Al-Sharī'ah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (p.53 onwards), *ibid*.

<sup>8</sup>Narrated by 'Ibn Mājah, Al-Dāraqūṭnī, and others on the authority of 'Abū Sa'īd Al-Khudriy, and narrated by Mālik with an incomplete narration. There are also many other chains of transmission of that Ḥadīth on the authorities of a number of companions that enforce one another, c.f. Al-Haythamī (, vol.4, p.110), Al-Ṣan'ānī (2nd printing, vol.3, p.84), 'Ibn Daqīq Al-'Id (, p.363), Al-Sakhāwī (, p.468).

<sup>9</sup>Al-Kasānī ((Ḥanafī), vol.7, p.177), 'Ibn Al-Humām ((Ḥanafī), vol.7, pp.302,306), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, pp.186-9), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.93 onwards), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.112 onwards).



In summary, disbelief, murder, and adultery cannot be permitted in any way, and whoever commits such actions is considered a sinner regardless of coercion. In this regard, the licentious allowance to express disbelief with the tongue is different from permissibility, for a licentious allowance only removes responsibility for the act, but does not render it permissible. In contrast, if an action is rendered permissible, the actor is relieved both of the sin and the responsibility for that action.

## 94.2 Rulings for this world

We shall now consider the consequences of coercion for the same three categories considered in the previous section.

### 94.2.1 Permissibility due to coercion

In this category, we shall study two main actions and the rulings thereof:

1. **Coerced drinking of wine:** Jurists agree that a totally coerced drinker of wine is not subject to the Legal punishment for drinking. This ruling follows from the fact that the punishment was legalized to dissuade the punished drinker from transgressing against the Law in the future.

However, the coerced drinker is not transgressing against the Law, since his action is permitted. On the other hand, the majority of jurists ruled that the dealings of coerced drunk individuals are not executed. In this regard, those who deemed the dealings of a drunk individual executed legalized it as a way of further punishing him (by executing his irrational dealings) and dissuading him from drinking again. However, in the case of coercion, there is no point in dissuading the coerced drunk, since he should in fact be treated like an insane individual.<sup>10</sup>

The Ḥanafis ruled that Legal punishment must be applied to the coerced drinker if the coercion was incomplete. They thus ruled that drinking wine in this case is forbidden, and hence the punishment must be applied as in the case of voluntary drinkers. In contrast, the non-Ḥanafis ruled that the punishment for drinking wine should not be applied to the partially coerced drinker, based on the Ḥadīth: “Allāh has disregarded three types of sins for my nation: those they commit by mistake, those they commit in forgetfulness, and those for which they were coerced”.<sup>11</sup>

<sup>10</sup>The majority of Shāfiʿis agree with the opinion of ʿAḥmad that all voluntary actions of a drunk individual are executed. In this regard, the Ḥanafis ruled that the voluntary actions of a drunk individual are executed, with the exception of apostasy and admission of guilt to punishable crimes (e.g. adultery). The majority of Mālikis ruled that the dealings of drunk individuals are executed with the exception of all admissions of guilt and indebtedness, and all contracts concluded while intoxicated. The Zāhiris agree with another narrated opinion of ʿAḥmad that the dealings of a drunk individual are not executed.

<sup>11</sup>Narrated by Al-Ṭabarānī in *Al-Kabīr* on the authorities of Thawbān and ʿAbū Al-Dardāʾ. Also narrated with a full chain of narrators by ʿIbn Mājah and ʿIbn Ḥibbān on the authority



2. **Coerced theft:** Jurists agree that a totally coerced thief is not considered a sinner, based on the previously cited Ḥadīth, and the fact that Legal penalties may only be applied if there is no doubt. The non-Ḥanafis also argued that the Ḥadīth pertains to all types of coercion and thus ruled that a thief is not considered a sinner if he was partially coerced. In contrast, the Ḥanafis ruled that partial coercion does not make theft a necessity, and thus there is a sinner and subject to the Legal penalty for theft.

### 94.2.2 Licentious allowance due to coercion

We shall consider two specific instances of the actions in this category:

1. **Coerced expression of disbelief:** Jurists agree that if the expression of disbelief was under total coercion, then the coerced man is not considered an apostate, and his wife is not divorced from him. However, the Mālikīs restricted this ruling to coercion with a threat to kill the coerced. However, if the threat was for anything less than death, they consider the coerced party to be an apostate if he expressed disbelief. The Mālikīs based this ruling on the view that any loss short of losing one's life is less harmful than loss of faith.

The Shāfi'ī, Ḥanbalī, and Zāhirī ruled that a person who expresses disbelief or prays at the cross under partial coercion is not considered an apostate, based on the verse: "Anyone who, after accepting faith in Allāh, utters disbelief, except under coercion with his heart remaining firm in faith, but those who open their breast to disbelief, on them is wrath from Allāh, and theirs will be a dreadful penalty" [16:106]. In contrast, the Mālikīs and Ḥanafis ruled that a partially coerced person is considered an apostate if he expresses disbelief or prays to a cross or idol. They based this ruling on the view that such partial coercion does not qualify as a necessity, but a mere inconvenience and pain. However, it is apparent that the Shāfi'ī and Ḥanbalī ruling is more appropriate, and closer to the meaning of the Qur'anic text.

While coerced apostasy is not considered apostasy, we have seen that coerced conversion to Islam renders the coerced party a Muslim. The difference between the two cases is that conversion to Islam is belief in the Truth, while apostasy is denial of the truth, both of which are matters of the heart. However, there can be no coercion in matters of the heart. Thus, in the case of acceptance of belief, the outward expression is accepted as a reflection of what is in the heart. However, in matters of

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of 'Ibn 'Abbās. 'Ibn Mājah has a second narration on the authority of 'Abū Dharr. 'Abū Nu'aym narrated it on the authority of 'Ibn 'Umar with the language: "Allāh has dropped ...". It was also narrated with slightly different language by 'Ibn 'Udayy on the authority of 'Abū Bakrah, and by Al-Ṭabarānī in *Al-'Awsaṭ* on the authority of 'Uqbah. However, the latter narration has 'Ibn Luhay'ah in its chain of narrators, and is thus considered a weak narration. C.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), pp.64-65), 'Ibn Ḥajar (, o.109), Al-Haythamī (, vol.6, p.250).



denial, outward expression under coercion is not accepted as an expression of what is in the heart. Thus, when a person converts to Islam under coercion, we have to rule that he is a Muslim, even if there is a probability that his heart did not accept the faith. This ruling gives priority to the True religion, and such prioritizing is required,<sup>12</sup> following the Ḥadīth: “Islam must have the highest priority over all other considerations”.<sup>13</sup>

In this regard, the non-Ḥanafīs only permit the coerced conversion of enemies of Islam, to the exclusion of Jews, Christians, and people with whom the Muslims signed a treaty of protection. In contrast, the Ḥanafīs permitted the coerced conversion of all of the above mentioned groups of people. Proofs for each party’s rulings can be found in expanded books of Islamic jurisprudence. The best supported ruling is the prohibition of coercing the conversion of Jews and Christians to Islam. Moreover, coercion of enemies of Islam to convert seems also impermissible, following the group of jurists who cited in this regard the verse: “Let there be no coercion in religion” [2:256].<sup>14</sup>

2. **Coerced destruction of property:** The Ḥanafīs, most of the Ḥanbalīs, and some of the Shāfi‘īs ruled that if a person totally coerces another to burn the property of a third party, then the coercer must guarantee compensation for the owner. This ruling is based on the view that the coerced party is a mere instrument of the coercer’s will, without any freedom of choice.

In contrast, the Mālikīs, the Zāhirīs, and some of the Shāfi‘īs ruled that the coerced party is still responsible to compensate the owner for his destroyed property. They based this ruling by analogy to the case of eating the food of others due to necessity. In both cases, the act is permitted, and the actor out of necessity is responsible for compensation.

The majority of Shāfi‘īs, and most of the Ḥanbalīs ruled that both the coercer and the coerced are responsible for the compensation of the owner whose property was destroyed. This ruling is based on the fact that the coerced actor caused the destruction in reality, while the coercer caused it ultimately. Thus, both parties are seen to have caused the destruction in some sense, and must share in the responsibility for compensation. However, the best supported opinion renders the coercer as the ultimate guarantor of the destroyed property.

On the other hand, if the coercion was partial, the Ḥanafīs, Mālikīs,

<sup>12</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.178), the article *Al-’Ikrāh Bayna Al-Sharī‘ah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (pp.61-67), ‘Ibn Al-Humām ((Ḥanafī), vol.7, p.307), ‘Ibn Qudāmah (, vol.8, p.145), ‘Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.114).

<sup>13</sup> Narrated by Al-Dāraquṭnī on the authority on ‘A’idh and ‘Amr ibn Al-Muznī, with two unknown narrators in its chain of narration. It was also narrated by Al-Bayhaqī and Al-Ṭabarānī on the authority of ‘Umar, and by Nahshal on the authority of Mu‘ādh. There is also an incomplete narration on the authority of ‘Ibn ‘Abbās; c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.3, p.213), Al-Ṣan‘ānī (2nd printing, vol.4, p.67).

<sup>14</sup> See Al-Zuhaylī’s *’Athār Al-Ḥarb fī Al-Fiqh Al-Islāmī*, second edition (p.78).



Zāhirīs, Shāfi'īs and Ḥanbalīs ruled that the coerced actor is responsible for the compensation of the owner. They based this ruling on the fact that a partially coerced person is not without free will. Hence, the coerced party is not a mere instrument of the coercer's will in this case, and thus the cause of destruction and resulting guaranty are attributed to him.<sup>15</sup>

### 94.2.3 Forbidden actions

We consider two cases in this category of actions:

1. **Coerced murder:** The jurists agree that a person is a sinner if he kills based on coercion. However, they differed in opinion regarding applying the murder penalty in the case of total coercion:
  - 'Abū Ḥanīfa, Muḥammad, Dāwūd, and 'Aḥmad and Al-Shāfi'ī in one reported opinion of two for each, ruled that the coercer, and not the totally coerced killer, is subject to the penalty for murder (*qiṣāṣ*). According to this ruling, the coerced killer in this case only receives a verbal penalty (*ta'zīr*). The ruling is based on the above listed Ḥadīth indicating that coerced actions are legally forgiven. In this regard, forgiveness of the coerced action implies forgiveness for its consequences. Thus, the murderer is seen in fact to be the coercer who must be punished thus, while the coerced killer is seen as a mere instrument of the coercer, and it is not appropriate to punish the instrument.
  - Zufar and 'Ibn Ḥazm ruled that the totally coerced killer is subject to the penalty for murder. They based this ruling on the fact that the coerced killer is the actual and observable killer, who thus performed a forbidden act, and must be punished accordingly. On the other hand, the coercer is merely viewed as the ultimate cause of the murder, and they do not consider the causer of murder to be subject to its penalty. Al-Ṭaḥāwī found this ruling to be the most appropriate one.
  - The Mālikīs, the Ḥanbalīs, and most of the Shāfi'īs ruled that both the coercer and the coerced must be subjected to the murder penalty in this case. They based this ruling on the view that the coerced party in fact performed the act of killing, while the coercer caused the killing. According to their school, both the actor and the causer are equal in guilt, and the murder penalty must be applied to both.

<sup>15</sup> Al-Kāsānī ((Ḥanafī), *ibid.*, p.179), Majma' Al-Damānāt (p.205), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.112), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.302), Al-Zayla'ī ((Ḥanafī Jurisprudence), p.186), 'Ibn Ḥazm (, vol.8, p.281), Al-Suyūṭī ((Shāfi'ī), p.179), *Qawā'id Al-'Aḥkām* (vol.2, p.132), *Tahdhīb Al-Furūq* (vol.2, p.203), *Al-Furūq* (vol.2, p.208), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.98), Al-Dardīr ((Mālikī)A, vol.3, p.444), 'Ibn Rajab (1st edition (Ḥanbalī), p.286).



- The first ruling (according to 'Abū Ḥanīfa) seems to be the most appropriate in this case.

On the other hand, all jurists agree that the coerced killer is subject to the murder penalty if the coercion is partial. This ruling is based on the view that partial coercion does not negate freedom of will, and hence the default ruling of punishing the murderer is not negated.<sup>16</sup>

The Ḥanafīs had two rulings, the better supported of which is the obligation on the coercer to pay financial compensation for the deceased (*diyyah*).

The major Ḥanafī jurists, with the exception of Zufar, ruled that a coerced killer is not denied his rightful inheritance if he is coerced to kill the person he inherited.

The same differences in opinion regarding coerced killing apply to coerced cutting of a person's hand. Moreover, jurists agreed that the act of killing a person or cutting his arm is not rendered permissible by permission from the killed or amputated person. However, if a coerced person cut a person's arm with his consent, no party is responsible for compensation, based on the permission. However, in the case of murder, most jurists ruled that the coercer is still liable for a financial compensation if he coerced a person to kill another with the permission of the latter, while few jurists ruled that no compensation is required in that case.<sup>17</sup>

2. **Coerced adultery:** We need to consider the jurists' rulings regarding coerced adulterers, be they women or men:

- The majority of jurists ruled that a coerced women is not punished for committing adultery under total or partial coercion. They based this ruling on the verse: "But force not your maids to prostitution when they desire chastity, in order that you may make a gain in the goods of this life. But if anyone coerces them, yet after coercion Allāh is oft forgiving, most merciful" [24:33]. This verse proves that a woman who commits adultery under coercion is not considered a sinner, and hence she is not subject to the adultery penalty.
- The majority of Ḥanbalīs ruled that a man who commits adultery under partial or total coercion must be subjected to the penalty of adultery. They ruled thus based on the view that adultery may only take place if he attains an erection. They thus reasoned that a man cannot attain an erection while he is frightened, and thus committing adultery for them is a sign of his volition. However, this reasoning is fallacious, since men normally have an involuntary erection when

<sup>16</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.7; vol.3, p.289), *Qawā'id Al-'Aḥkām* (vol.2, p.132), 'Ibn Rajab (1st edition (Ḥanbalī), p.187), 'Ibn Qudāmah (, vol.7, p.645).

<sup>17</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.180), *Majma' Al-Ḍamānāt* (pp.204-5), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.112), *Al-Taḥāwī* ((Ḥanafī), p.409 onwards).



they approach a woman, and men are known to have involuntary erections during their sleep.

- The Shāfi'īs ruled that an adulterer is not subject to the penalty of adultery if he committed the act under partial or total coercion. They based their ruling on the view that any suspicion is sufficient to prevent the application of Legal penalties, and all types of coercion establish a level of reasonable doubt.
- 'Abū Ḥanīfa initially ruled that a coerced adulterer must be subjected to the penalty of adultery. He later ruled that the penalty should not be applied if the adulterer was totally coerced. Recall in this context that he ruled for his time that total coercion was only possible by a threat of the ruler.

'Abū Yūsuf and Muḥammad ruled that the totally coerced adulterer is not subject to the adultery penalty, regardless of the source of total coercion. However, if the coercion was partial, then they ruled that the coerced party's free will was not negated by coercion, and he must be made subject to the penalty. This is the general Ḥanafī ruling: the coerced adulterer is subject to the penalty of adultery if the coercion is partial, but not subjected to it if the coercion is total.

- The Mālikīs ruled that the penalty of adultery must be applied if both the man and woman were coerced. On the other hand, if the woman was unmarried and willing, she is considered to have dropped her right by her consent, and the only the right of Allāh is remaining, the penalty is dropped by virtue of coercion. Hence, the majority of Mālikīs ruled in this case that the man is not subject to the penalty of adultery if he was threatened with death, and subject to the penalty otherwise. However, the majority opinion in the Mālikī school remains to be the application of the penalty of adultery to both the man and the woman.
- The Ḥanbalīs also ruled that coerced adulterers must be subjected to the penalty of adultery.
- The Shāfi'ī ruling is the most appropriate in this case, based on their proof that Legal penalties (*ḥudūd*) are not applied in the presence of reasonable doubt (*shubḥa*).<sup>18</sup>

### 94.3 Coercion to take one of two actions

So far, we have considered coercion to take a specified physical action. On the other hand, if the coerced party has a choice of actions within some specified

<sup>18</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.180), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.306), Al-Taḥāwī ((Ḥanafī), p.410), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.95), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.189), the article *Al-Ikrāh Bayna Al-Sharī'ah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (p.56 onwards), Al-Dardīr ((Mālikī)A, vol.4, p.318), 'Ibn Qudāmah (, vol.5, p.251).



set, the legal rulings pertaining to the hereafter remain the same for the three categories of permissible, allowable, and forbidden actions. However, the coerced party in this case is required to choose the least sinful of the possible actions under coercion. Thus, if he is coerced to kill a Muslim or eat the meat of a dead animal, eating the meat is rendered permissible, and the killing is not considered allowable. In this case, if he refuses to eat and is consequently killed by the coercer, he is considered a sinner for having allowed himself to be killed. Similarly if a person is coerced either to destroy the property of another or to kill him, destroying his property becomes allowable.

However, if he is coerced to kill a person or to commit adultery, neither action is rendered allowable, and he is not considered a sinner if he is killed for refusing to do either. On the other hand, if he is coerced to kill a person or profess a denial of the faith, the latter becomes allowable provided that he continues to accept the faith in his heart.

In contrast, the legal status for this world may differ when there is an option in the coercion. Thus, if a person is coerced to eat the meat of a dead animal or to kill a Muslim, and he decided to kill rather than eat, the Ḥanafis ruled that he is thus liable for the penalty of murder (*qiṣāṣ*). This ruling follows from the fact that the coerced party in this case had the opportunity to avoid the necessity by eating permitted food, and hence the murder is considered voluntary.

Similarly, reasoning by analogy dictates the murder penalty should apply to a person who was coerced to kill a Muslim or profess disbelief, and chose killing. This ruling is based on the fact that he would have thus chosen the forbidden action over the allowable, and thus the killing is deemed voluntary. However, the ruling based on juristic approbation is that he should not be subjected to the physical murder penalty (*qiṣāṣ*), but should pay the financial compensation (*diyyah*) if he did not know that it is allowable in this case to profess disbelief with his tongue.<sup>19</sup>

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<sup>19</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.181).



## Chapter 95

# Legal Actions

We start with an analysis of specific verbal and legal actions, which may be initiating a new legal relationship (*'inshā'*), or acknowledging one (*'iqrār'*). In turn, initiating legal actions may be divided into two groups: those that can be voided, and those that cannot. Examples of initiating legal actions that cannot be voided include divorce, marriage, separation, oath taking, and absolution from the physical penalty for murder. Some Ḥanafis counted twenty types of legal actions in this category, but closer analysis shows that there are in fact only fifteen.<sup>1</sup> On the other hand, initiating legal actions that can be voided include all actions that lead to ownership, such as sales, leases, etc.

### 95.1 Binding legal actions

Binding legal actions are those that cannot be voided. The Ḥanafis ruled that coercion has no effect on such actions, which are thus binding regardless of coercion. For instance, if a man is coerced to divorce his wife, make a pledge, take an oath, separate from his wife, marry, return a divorced wife to the marriage, absolve a killer of the physical penalty, etc., the initiated contract is binding. This ruling follows from the fact that such dealings are concluded regardless of the seriousness of intent of the actor. In this regard, coercion is similar to lack of seriousness of intent, since the actions of a coerced person lack valid consent and expression of intent. The formal proof of this ruling is the Ḥadīth of Ḥudhayfah ibn Al-Yamān (mAbpwh) that “the unbelievers took him as a hostage, and coerced him to swear that he will never support the Messenger of Allāh (pbuh) in any military forays, and he swore thus. The Prophet (pbuh) told him: ‘fulfill your promise to them, and we shall seek the help of Allāh against them’.” Moreover, <sup>c</sup>Abdul-Razzāq narrated in his *Muṣannaf* that <sup>c</sup>Ibn <sup>c</sup>Umar recognized the divorce of a coerced husband,<sup>2</sup> which is further supported

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<sup>1</sup>Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, p.96).

<sup>2</sup>Narrated by <sup>c</sup>Abdul-Razzāq in his *Muṣannaf* that <sup>c</sup>Ibn <sup>c</sup>Umar, c.f. Al-Ḥāfiẓ Al-Zayla<sup>c</sup>ī (1st edition, (Ḥadīth), vol.3, p.222).



by the generality of the verse: “So if the husband divorces his wife (irrevocably), he cannot after that remarry her until after she had married another husband and he has divorced her” [2:230]. In summary, dealings in this category are considered valid and binding on the coerced actor.

In contrast, the non-Ḥanafī jurists ruled that coercion renders such dealings defective. For instance, they do not consider the divorce or marriage of a coerced husband to be concluded. This seems to be the more appropriate ruling. The non-Ḥanafīs based this ruling on the fact that coerced verbal profession of disbelief has no legal consequences, as per the verse “Anyone who, after accepting faith in Allāh, utters disbelief, except under coercion with his heart remaining firm in faith, but those who open their breast to disbelief, on them is wrath from Allāh, and theirs will be a dreadful penalty” [16:60]. Thus, they ruled that any coerced verbal action has no legal consequences.

In this regard, it is narrated in the Sunnah that Khansā’ bint Khuzām was married by her father without her consent after she had been previously married. She thus complained to the Messenger of Allāh (pbuh), and he nullified the marriage.<sup>3</sup> In another supporting incident from the Sunnah, it is narrated that a man married off his daughter to his nephew against her will, and the Prophet (pbuh) gave her the option.<sup>4</sup> There is also a narrated Ḥadīth that the Prophet (pbuh) said: “Divorce in a state of *’ighlāq* is not concluded”.<sup>5</sup> In this regard, Al-Shāfi‘ī explained *’ighlāq* as coercion. In another Ḥadīth, the Prophet (pbuh) said: “Allāh has disregarded my nation’s mistakes, forgetfulness, and coerced transgressions”.<sup>6</sup> In other words, the Legal status of a coerced action is negated. It is also logical that coerced actions in this category should be invalidated, to protect the rights and property of people.

Consequently, the Shāfi‘īs ruled that coercion in divorce, freeing of slaves, sales, leases, marriages, remarriage, and similar dealings, renders such dealings invalid. In this regard, the negation of the legal status of the coerced contract implies that the consequences of the contract (e.g. the validity of divorce,

<sup>3</sup>Narrated by Al-Bukhārī on the authority of Khansā’ bint Khuzām, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.3, p.191).

<sup>4</sup>Narrated by Al-Nasā‘ī and ‘Aḥmad on the authority of ‘A’ishā, who said that a woman came to her, and said that her father had married her to his nephew against her will to improve his social status. ‘A’ishā asked her to wait until the Prophet (pbuh) came. When the Prophet (pbuh) learned of the story, he called for the father, and gave the woman the choice. The woman then said that she consents to what her father did, but that she wanted to contest his action simply to let other women know that fathers do not have any control in this matter. Al-Bayhaqī said that this Ḥadīth had an incomplete transmission. It is supported by other Ḥadīths with incomplete transmissions narrated by ‘Aḥmad, ‘Abū Dāwūd and ‘Ibn Mājah on the authority of ‘Ibn ‘Abbās, c.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.122), Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.3, p.192).

<sup>5</sup>Narrated by ‘Abū Dāwūd, ‘Ibn Mājah, and Al-Ḥākim (who said that it met the authenticity conditions of Muslim) as: “Divorces and freeing of slaves in a state of *’ighlāq* are not concluded”. ‘Abū Dāwūd said that the term (*’ighlāq*) means anger, but most analysts ruled that the term encompasses coercion, anger, insanity, and any other condition that compromises the actor’s ability to judge and control the consequences of his actions, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.3, p.223).

<sup>6</sup>Narrated by Al-Ṭabarānī on the authority of Ṭhawbān, and considered by Al-Suyūṭī to be a valid Ḥadīth, c.f. Al-Suyūṭī (a, vol.4, p.35).



marriage, sale) do not take place. However, they noted one exception to this general ruling, indicating that a coerced killer is still subject to the physical penalty for murder. The latter ruling is based on the grave subject matter of murder, which requires protecting the prohibition of murder at all expenses.<sup>7</sup> In this regard, they rejected the Ḥadīth: “Three contracts are serious, even when uttered lightly, marriage, divorce, and remarriage”,<sup>8</sup> upon which the Ḥanafīs based their ruling as weak. Moreover, as Ibn Ḥazm pointed out, the Ḥadīth of Ḥudhayfah is invalid.

In response to the narration regarding Ibn ʿUmar’s recognition of the divorce of a coerced husband as valid, they referred to the citation of Ibn Ḥajar in *Fath Al-Bārī* of ʿAbdul-Razzāq’s narration that Ibn ʿUmar ruled in the story of Thābit Al-Aʿraj that coerced divorce is not permissible. There are further narrations in Al-Bayhaqī’s *Sunan*, Al-Bukhārī’s *Ṣaḥīḥ*, and Mālik’s *Muwatṭaʾ* that indicate that Ibn ʿUmar considered coerced divorce to be invalid.

Finally, the Ḥanafī understanding of the verse “So if the husband divorces his wife (irrevocably), he cannot after that remarry her until after she had married another husband and he has divorced her” [2:230] contradicts the verse “Allāh will not call you to account for thoughtless oaths, but for the intention in your hearts” [2:225]. Also, the verse [2:230] refers to the third divorce, while the coerced husband in our example is assumed never to have divorced his wife before. Finally, the Ḥanafīs argued that the Ḥadīth “A coerced divorce is not concluded” is probabilistic (*ẓannī*), and thus cannot restrict the import of a certain (*qaṭʿī*) text (the verse of divorce [2:230]). However, the correct opinion for the Shāfiʿīs is that the probabilistic text can in fact restrict the certain text, since that very verse was restricted by the well-known Ḥadīth: “Three are not responsible for their actions: a child until he grows older, a sleeper until he wakes up, and an insane person until he regains his sanity”.<sup>9</sup> Thus, the import of the verse is in fact probabilistic, and may be restricted by a probabilistic account.<sup>10</sup>

<sup>7</sup> *Takhrīj Al-Furūʿ ʿalā Al-ʿUṣūl* (p.149).

<sup>8</sup> Narrated by the four authors of *Sunan* with the exception of Al-Nasāʾī, and the narration on the authority of ʿAbū Hurayrah was deemed valid by Al-Ḥākim. However, another narration by Ibn ʿUdayy is weak, c.f. *Al-Ṣanʿānī* (2nd printing, vol.3, p.175), *Ibn Daqīq Al-ʿId* (, p.423 onwards), *Al-Ḥāfiẓ Al-Zaylaʿī* (1st edition, (Ḥadīth), vol.3, p.293 onwards).

<sup>9</sup> Narrated by ʿAḥmad and the four authors of *Sunan* with the exception of Al-Tirmidhī, and deemed valid by Al-Ḥākim. It was also narrated by Ibn Ḥibbān on the authority of ʿAʿīsha and by others on the authorities of ʿAlī ʿUmar, Ibn ʿAbbās, ʿAbū Hurayrah, and others, c.f. *Al-Hayṭhamī* (, vol.6, p.251), *Al-Ṣanʿānī* (2nd printing, vol.3, p.180), *Ibn Daqīq Al-ʿId* (, pp.66,421).

<sup>10</sup> *Al-Kāsānī* ((Ḥanafī), vol.7, p.182 onwards), *Ibn Al-Humām* ((Ḥanafī), vol.7, p.303), *Al-Zaylaʿī* ((Ḥanafī Jurisprudence), vol.5, p.188), *Ibn ʿĀbidīn* ((Ḥanafī), vol.5, p.96), *Majmaʿ Al-Ḍamānāt* (p.206), *Ibn Ḥazm* (, vol.8, p.383 onwards), *Al-Khaṭīb Al-Shirbīnī* ((Shāfiʿī), vol.3, p.289), *Al-Dardīr* ((Mālikī)A, vol.2, p.367), *Ibn Qudāmah* (, vol.7, p.118), the article *Al-ʿIkrah Bayna Al-Sharʿiyyah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (sec.2, p.2 onwards).



## 95.2 Non-binding actions

The majority of Ḥanafis ruled that actions that require consent and can be voided (e.g. sales, gifts, leases, etc.) are rendered defective if the actor was partially or totally coerced. Thus, they consider the dealing executed but defective. For instance, if the action was a sale, the buyer would attain ownership rights if he receives the merchandise of the coerced sale. However, the sale or similar dealing is considered defective since consent is an executability condition in such contracts. In this regard, coercion negates the actor's consent, and hence would normally render the contract non-executable and give the coerced actor the option of voiding or executing when he is no longer coerced.

The Mālikīs and the Ḥanafī jurist Zufar ruled that coerced dealings of the type discussed here are considered suspended pending the actor's consent. This ruling follows from their view that consent is a condition of validity for the contract, and not a condition of its conclusion. Then, if the coerced party consents to the contract after the coercion is removed, the contract becomes valid. In this regard, they disagree with the majority of Ḥanafīs in their classification of the contract as defective, since defective contracts for them cannot be rendered permissible through the actor's consent. Thus, they compared coerced sales to un-commissioned agent sales that are suspended, rather than comparing them to defective sales. In this regard, since the sale is suspended, it only results in the establishment of ownership through receipt.

In summary:

- 'Abū Ḥanīfa, 'Abū Yūsuf, and Muḥammad ruled that coercion renders voidable dealings defective but not invalid. Thus, they apply the rulings of defective contracts to coerced dealings, with the exception that they render the contract valid and binding if the coerced party permits it after the coercion is removed. They ruled thus based on the view that defectiveness was established in this case only to protect the rights of the coerced party, rather than to protect any public interest.
- On the other hand, Zufar considers the coerced contract to be non-executable, in analogy to contracts concluded by an un-commissioned agent. Thus, the contract is considered suspended pending the approval of the coerced party after the coercion is removed. He further argued that considering the contract valid and binding upon approval implies that the contract was only suspended, and not defective, since defective contracts are voided and cannot become validated through approval. Note that Zufar's proof is formally stronger and logically more reasonable. However, the accepted Ḥanafī opinion is that of 'Abū Ḥanīfa, 'Abū Yūsuf, and Muḥammad.<sup>11</sup>
- All other jurists ruled that coerced dealings in this category are considered invalid.<sup>12</sup>

<sup>11</sup> *Al-Madkhal Al-Fiqhī* by Professor Al-Zarqā' (p.364).

<sup>12</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.186), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.293 onwards),  
<sup>c</sup> Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.108), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5,



Thus, we may enumerate four rulings for the sales of a coerced person:

1. 'Abū Ḥanīfa, 'Abū Yūsuf, and Muḥammad ruled that coerced sales are defective in a manner similar to the defectiveness of sales based on ignorance, *ribā*, etc. The defectiveness in this case is established due to the lack of consent. However, they made this case an exception from other defective sales by considering the sale valid and executable if the coerced seller approves it after the coercion is removed. On the other hand, the coerced seller also has the option of voiding the contract and recalling the property he was forced to sell, regardless of whether or not it was resold. This ruling is established to protect the seller's rights and property.

This ruling is in contrast to other defective sales, based on *ribā* or similar factors, in which later permission is immaterial. In those other defective sales, the defectiveness pertains primarily to a right of the Law against prohibitions of *ribā* and such factors. Moreover, the resale of the object of a defective sale is normally executed, and the original seller in this case is not given an option to void the original sale, to protect the rights of the second buyer. This latter ruling is based on the higher priority of the buyer's right over the Legal rights of Allāh, since Allāh is not in need of protection of his rights, while men need their rights to be protected.

2. Zufar ruled that a coerced sale is suspended pending the coerced seller's permission after the coercion is removed.
3. The Mālikīs ruled that a coerced sale is not binding, since the coerced seller is given an option to void the contract or execute it. This opinion is also in accordance with the Ḥanafī jurist Al-Qadūrī's rulings regarding a coerced person's sale, purchase, and acknowledgement of liability.
4. The Shāfi'īs, Ḥanbalīs and Zāhirīs ruled that coerced sales are invalid.

### 95.3 Coerced acknowledgement of liability

There are two main juristic rulings regarding unjust coercion to acknowledge false liabilities:

1. The Ḥanafīs, Shāfi'īs, Ḥanbalīs and Zāhirīs ruled that such false coerced acknowledgement is legally disregarded, regardless of whether the acknowledgement pertains to voidable dealings (e.g. sales and leases) or non-voidable ones (e.g. divorce and remarriage).

The Ḥanafīs based their ruling on the view that acknowledgement of rights and liabilities constitutes a statement that may be true and maybe false.

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p.182), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.89 onwards), 'Ibn Ḥazm (, vol.8, p.380), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.5), the article *Al-'Ikrāh Bayna Al-Sharī'ah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (sec.2, p.25).



In this regard, acknowledgements of liability that are not coerced are accepted as truthful, since a man's admission of his own liability cannot be self-serving. In contrast, the default is falsehood of admissions of liability made under coercion, by virtue of the threat due to which the admission is made.

The non-Ḥanafīs justified their ruling on the basis of the Ḥadīth: "Allāh has disregarded for my nation their mistakes, forgetfulness, and coerced actions", which refers to all types of coercion. Thus, they reasoned that the legal status of all coerced actions, including acknowledgements, are thus disregarded and inconsequential.

2. The Mālikīs ruled that coerced acknowledgements of false liabilities are considered non-binding. Thus, the coerced party is given an option after coercion is removed either to reaffirm the acknowledgement or to negate it. Their proof for this ruling was based on analogy to coerced divorces, which are non-binding.

They Mālikīs and most other jurists further ruled that coerced admission of committing adultery, drinking wine, stealing, slandering, or killing, are automatically voided. Thus, no Legal penalties may be applied based on such coerced admissions of guilt. This ruling is based on the general rule that the application of Legal penalties is prevented if there is reasonable doubt, and coercion gives rise to reasonable doubt (*shubha*).<sup>13</sup>

## 95.4 Coercion with some choice

We have seen that all legal actions can be classified as voidable or non-voidable. There are two main rulings regarding coercion to perform one of a number of legal actions that are non-voidable:

1. The Shāfi'īs ruled that there is no coercion if the coerced party is given a choice. Thus, if a person chooses from the coerced set of available actions one that is non-voidable, the action is thus executed and binding.
  - Thus, they ruled that if a man is coerced to divorce either a wife with whom he had consummated the marriage or a wife with whom he had not, the coercion is disregarded, and whichever divorce he concludes is executed. They ruled thus based on the view that he had a choice not to divorce the woman he did divorce.
2. The non-Shāfi'īs ruled that it is possible for a person to be given a certain degree of choice, but to be considered coerced nonetheless. Thus, they

<sup>13</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.189 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.265), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.182), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.89), Majma' Al-Ḍamānāt (p.206), Al-Dardīr ((Mālikī)A, vol.3, p.397), 'Ibn Qudāmah (, vol.8, p.196), Al-Bājūrī (5th printing (Shāfi'ī), vol.2, p.4), the article *Al-'Ikrāh Bayna Al-Sharī'ah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (sec.2, p.44 onwards).



apply the same rulings in this case as in the case where the coerced action was uniquely specified.

- Thus, they agreed that coercion plays a role in their rulings, e.g. in the divorce example. However, they differed in their rulings based on that coercion. Thus, the Ḥanafīs ruled that the divorce is executed, since they ruled that coercion has no effect on verbal actions that are non-voidable. On the other hand, the majority of Mālīkīs ruled that whichever divorce the man chooses is not binding, and the coerced husband has the option after coercion is removed to void the divorce or to permit it. Finally, the Ḥanbalīs ruled that the divorce is executed, since they do not differentiate between uniquely identified coerced actions and coercion with a limited choice.

There are also two main rulings regarding coercion of voidable legal actions:

1. We have seen that the Shāfiʿīs ruled that coercion is disregarded if the coerced party is given any choice.
  - Thus, if a man is coerced to sell one of two buildings that he owns, the Shāfiʿīs ruled that the sale is executed for whichever one he chooses to sell, since they do not consider the sale to be coerced.
2. We have also seen that the non-Shāfiʿīs allow for the possibility of coercion with some degree of choice.
  - Thus, the Ḥanbalīs and Zāhirīs consider the sale of either building to be invalid in our example, the majority of Ḥanafīs consider that coerced sale to be defective, and the Mālīkīs and Zufar consider it to be suspended. The proofs for those rulings are the same as we have seen in the previous section.<sup>14</sup>

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<sup>14</sup>ibid., Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.289), Al-Dardīr ((Mālīkī)A, vol.2, p.367), the article *Al-ʾIkrāh Bayna Al-Sharīʿah wa Al-Qānūn* by Sh. Zakariyya Al-Bardīsī (sec.2, p.60 onwards).



**Part XVI**

**Interdiction**



## Preliminaries

We shall study interdiction in four chapters:

1. Definition and legality.
2. Reasons for interdiction.
3. Removal of interdiction.
4. Associating debts with a deceased person's estate.



## Chapter 96

# Definition and Legality

### 96.1 Definition

The Arabic word *ḥajr* refers literally to a limitation of actions. Thus, the term *ḥijr* is sometimes used to mean forbidden actions, as in the verse: “The day they see the angels, no joy will there be for the sinners that day, and they will say: ‘there is a barrier (*ḥijr*) forbidden (*maḥjūr*) for you altogether’ ” [25:22]. Moreover, the mind was called a (*ḥijr*), as in the verse: “Is there not in these an evidence for those with understanding (*ḥijr*)” [89:5], since it forbids its possessor to commit harmful deeds. Similarly, the area known as *Al-Ḥaṭīm* is called a *ḥijr*, since it was kept out of the Kaʿbah.

Juristically, *ḥajr* or interdiction is the prevention of an individual from dealing in his property. The opposite of interdiction is permission (*ʿidhn*), which drops the interdiction and reinstates a person’s right to deal in his property.<sup>1</sup> Jurists gave a variety of similar definitions to interdiction, which we shall list below:

- The Ḥanafīs defined interdiction as making the contracts and verbal dealings of the interdicted party non-binding.<sup>2</sup> For instance, the sales and gifts of an interdicted person are not binding or executable, and hence the consequences of the contract (transfer of ownership) can only be established through receipt. In this regard, interdiction applies to contractual and verbal activities, since the executability of such actions may be prevented. However, physical activities cannot be interdicted, since physical actions cannot be made to disappear after having taken place. However, interdiction as it relates to contracts and verbal actions is effective by preventing contracts from being legally concluded or executed. In this regard, the Ḥanafīs gave a more precise definition of interdiction thus: “It is a specific prevention of a specific person from performing specific actions, or allow-

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<sup>1</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.203), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.108).

<sup>2</sup> Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.99), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.190), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2,p.66).



ing such actions to be binding and executable, by rendering the contracts of the interdicted individual suspended”.<sup>3</sup>

Thus, interdiction may render the dealings of small children and insane individuals non-concluded if they are purely harmful (e.g. a divorce). Interdiction also renders the dealings of a discerning child suspended pending the permission of his guardian or plenipotentiary, and render the dealings of undiscerning children invalid.

However, interdiction against physical actions is meaningless. Thus, a small child or an insane person is deemed a guarantor of the property of others if he destroys it. Thus, the price of property destroyed by such individuals must be taken from their wealth, and demands of compensation must be addressed to the guardian or plenipotentiary. This ruling follows from the fact that the situation thus dictates that the transgressor must compensate the owner for his destroyed property. However, such non-discerning individuals are not subjected to physical Legal punishments, since a valid intent cannot be attributed to them. Thus, if a non-discerning child or an insane person kills a Muslim, they will be responsible for financial compensation (*diyyah*), since the killing is thus considered to be wrongful manslaughter.

- The Mālikīs defined interdiction as a legal characteristic that prevents the dealings of the characterized individual from being executed beyond obtaining sustenance, or prevents him from giving his property in charity beyond the first one-third.<sup>4</sup> The first category applies to interdictions of small children, the insane, the mentally incompetent, and the bankrupt. Those types of individuals are prevented from dealing in their property through sales or contributions beyond obtaining sustenance, and all their dealings are thus suspended pending the permission of their guardian. The latter type of interdiction applies to a terminally ill person or a man’s wife, both of whom are not prevented from trading, but are banned from giving more than one-third of their wealth to charity.
- The Shāfi‘īs and Ḥanbalīs defined interdiction as a prevention of engaging in financial dealings.<sup>5</sup> Thus, they include in their definition the legal prevention of small children and the insane from trading, as well as the prevention of a buyer from dealing in his property until he pays the price he owes. In this regard, they ruled that an interdicted person is not prevented from engaging in non-financial dealings, such as divorce, admission to crimes for which the Law dictates physical punishment, performing various obligatory and encouraged acts of worship. In this regard, the obligatory financial forms of worship of an interdicted individual are executed, to the exclusion of encouraged financial forms of worship. However, all dealings of

<sup>3</sup>Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.99).

<sup>4</sup>Al-Dardīr ((Mālikī)B, vol.3, p.381).

<sup>5</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.165), Ibn Qudāmah (, vol.4, p.456), Al-Buhārī (3rd printing (Ḥanbalī), vol.3, p.404).



small children and insane individuals in properties, liabilities, and marital affairs, are deemed invalid.

## 96.2 Proof of legality

There are three verses in the Qur'ān that indicate the permissibility of the principle of interdiction:

1. The first verse states: “To those weak of understanding, make not over your property which Allāh has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice” [4:5]. In this verse, Allāh (swt) forbade guardians and plenipotentiaries from allowing mentally incompetent individuals to take control over their properties, to prevent them from wasting it. Thus, the Text indicates that those mentally incompetent are forbidden from dealing in their property, which is the nature of interdiction.
2. The second verse states: “Make trial of orphans until they reach puberty, if then you find them of sound judgment, release their properties to them” [4:6]. Thus, Allāh (swt) ordered the guardians to test the orphans, by allowing them to deal in a small portion thereof to test their financial abilities. Then, if the orphan is found to be discerning prior to reaching puberty, they may be given control over their property. This Text implies that prior to attaining discernment, the children are not allowed to deal in their property, and are thus under interdiction.
3. The third verse says: “If the liable party is mentally deficient or weak, or unable to dictate himself, let his guardian dictate faithfully” [2:282]. Al-Shāfi‘ī (mAbpwh) explained the mentally deficient in this verse to refer to the spendthrift, the weak to refer to children and demented old people, and the one who cannot dictate to refer to the insane. Thus, Allāh (swt) ordered the guardians of such people to take their place in the documentation of debts, implying that such individuals are under interdiction.

It is also established in valid Ḥadīths that the Prophet (pbuh) interdicted Mu‘ādh and forced him to sell his property to repay his debt,<sup>6</sup> and ‘Uthmān is reported to have interdicted ‘Abdullāh ibn Ja‘far for overspending.<sup>7</sup>

## 96.3 The wisdom in permitting interdiction

Interdiction does not in reality compromise the dignity of the interdicted. In fact, it is a form of mercy, protection, and cooperation. Indeed, it is out of

<sup>6</sup>Narrated by Al-Dāraqūṭnī, Al-Bayhaqī and Al-Ḥākim who deemed it valid, on the authority of Ka‘b ibn Mālīk, c.f. Al-Shawkānī (, vol.5, p.244 onwards).

<sup>7</sup>Narrated by Al-Shāfi‘ī in his *Musnad* on the authority of ‘Urwah ibn Al-Zubayr, c.f. Al-Shawkānī (, vol.5, p.245).



mercy for the interdicted that interdiction is legalized to protect his property from his own abuse. Moreover, it protects the benefits of individuals as well as society as a whole, by training the interdicted gradually until they are capable to deal in their property wisely, so that wealth is not wasted. Finally, it is a commendable form of assistance given by the guardian to ensure that the property of the interdicted child or incompetent person is preserved. In the case of children, the guardian further trains them to be responsible members of society who use their wealth optimally. In the cases of mentally incompetent people, the guardian protects their interests against their own inability to make beneficial purposive choices. In the case of interdiction of debtors, the intention is clearly to protect the rights of creditors, and thus to encourage the extension of credit in society.

Thus, we see that interdiction is beneficial to the interdicted individual, by protecting his property, as well as to society as a whole, by preventing poverty. In this regard, property is the very lifeblood of a society, and its proper spending avoiding going to either extreme is a necessity, as Allāh (swt) said: “Verily spendthrifts are brothers of devils” [17:27].

Society also benefits from the fact that Allāh (swt) has ordered guardians and plenipotentiaries to look after the benefits of orphans and the destitute with honesty and justice. This is of great help to all members of society, since no person can be immune from the possibility that his offspring will be weak and will need the assistance of others. Allāh (swt) said in this regard: “Let those disposing of an estate have the same fear in their minds as they would have for their own if they had left a helpless family behind. Let them fear Allāh and speak words of appropriate (comfort). Those who unjustly devour the property of orphans eat a fire into their own bodies, and they will soon be enduring a blazing fire” [4:9-10].

In this regard, ‘Imām ‘Aḥmad, Al-Nasā’ī, ‘Abū Dāwūd, and others narrated on the authority of ‘Ibn ‘Abbās that when the verse: “Come not near to the orphan’s property except in the best of ways” [17:34], all Muslims separated their wealth from the wealth of orphans, until foodstuffs started perishing. Shortly after the Prophet (pbuh) was told about this, he received the verse: “If you mix their affairs with yours, they are your brothers, and Allāh knows the man who means mischief from the one who means good” [2:220]. Moreover, Allāh (swt) ordered the guardians to test orphans before giving them control over their property: “Make trial of orphans until they reach puberty, if then you find them of sound judgment, release their properties to them” [4:6], and forbade them from giving the mentally incompetent control over their property: “To those weak of understanding, make not over your property which Allāh has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice” [4:5]. Those injunctions protect the interests of the interdicted party as well as the general interests of society.

We have also listed the established Ḥadīths that legalized interdiction of debtors to protect the rights of creditors. The two Ḥadīths we listed in this regard was the one narrated by Al-Dāraquṭnī on the authority of Ka’b ibn Mālīk regarding the interdiction of Mu‘ādh and selling his property to repay his



debt, as well as the one narrated by Al-Shāfiʿī on the authority of ʿUrwah ibn Al-Zubayr that ʿUthmān interdicted ʿAbdullāh ibn Jaʿfar due to his overspending.

## 96.4 Types of interdiction

There are two main types of interdiction, classified according to the type of benefit that interdiction protects:<sup>8</sup>

1. Interdictions of young children, the insane, the mentally incompetent, and the spendthrift, only benefit the interdicted party and nobody else. Hence, those interdictions were legalized for their individual benefits.
2. Interdiction of a bankrupt debtor benefits his creditors, interdiction of a terminally ill person benefits his heirs for two-thirds of the estate after payment of debts, and interdiction of a pawning debtor benefits the creditor whose right is associated with his pawned property. In those cases, the interdiction was legalized for the benefit of a party other than the interdicted.

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<sup>8</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.165), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.404 onwards).



## Chapter 97

# Reasons for Interdiction

There are many reasons for interdiction, some of which are unanimously recognized due to lack of eligibility (e.g. young age, and insanity), and some are subject to juristic differences in opinion (e.g. mental incompetence, loss of consciousness and religion, etc.). In the latter set, jurists differ in opinion regarding the need to protect the interdicted individual or others, rather than disagreeing over the eligibility considerations. The consequences of interdictions depend on the reason for its establishment. In this chapter, we shall discuss specific reasons for interdiction, and their legal consequences.

### 97.1 Young children

Every human being goes through a period of young age, and jurists have agreed that young orphans must be interdicted.<sup>1</sup> This ruling is based on the verse: “Make trial of orphans until they reach puberty, if then you find them of sound judgment, release their properties to them” [4:6], as well the ineligibility of small children for financial dealings due to their lack of discernment. However, jurists have differed in opinion regarding the consequences of this interdiction for the dealings of small children.

#### 97.1.1 Consequences of a child s dealings

The Mālikīs and Ḥanafīs distinguished between the dealings of discerning children and those of non-discerning children, while the Shāfi‘īs and Ḥanbalīs did not differentiate thus:

- The Ḥanafīs and Mālikīs ruled<sup>2</sup> that a child is non-discerning if he has not

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<sup>1</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.275).

<sup>2</sup>Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.101), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.191), Ibn Al-Humām ((Ḥanafī), vol.7, p.310 onwards), Al-Kāsānī ((Ḥanafī), vol.7, p.171), ‘Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.67), Al-Dardīr ((Mālikī)A, vol.3, pp.294-6), Al-Dardīr ((Mālikī)B, vol.3, p.384), Ibn Juzayy ((Mālikī), p.320), Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.278).



reached the age of seven, and discerning otherwise. This ruling is based on the Ḥadīth: “Order your children to pray once they reach the age of seven”.<sup>3</sup>

They ruled that interdiction has no consequences for physical activities such as usurping or destroying property. Thus, a child or insane individual who engages in such activities is responsible for the compensation of the property’s owner. This ruling follows from the fact that interdiction pertains only to verbal, and not to physical, actions.<sup>4</sup>

They further ruled that the verbal dealings of a non-discerning child are invalid, since he lacks eligibility for any such dealings. Thus, his consent and intent cannot be considered legally, and his dealings are invalidated regardless of whether they are purely beneficial, merely harmful, or mixed in benefit and loss. In this sense, a non-discerning child’s contracts, acknowledgements of liability, and divorce, are legally disregarded in analogy to the rulings for the insane.

On the other hand, they differentiate between the three types of dealings in which discerning children may engage:

- Purely beneficial dealings of discerning children, such as accepting gifts and inheritance, and accepting Islam, are deemed valid and executed without need for his guardian’s or plenipotentiary’s consent. This ensures the maximal benefit for the child.
- Merely harmful dealings of discerning children, such as giving charity and loans, and divorce, are deemed invalid and non-executable. Such dealings do not become valid even if approved by the child’s guardian, since such approval cannot reverse the invalidity of a contract. Thus, the Ḥanafis established a juristic ruling: “All divorces are concluded, except for the divorces of children and mentally incompetent men”. Some of them narrated it as a Ḥadīth, but it does not have a valid origin in Ḥadīth.<sup>5</sup>
- Dealings of a discerning child that may be harmful or beneficial, e.g. trading, leasing, and marriage, are deemed suspending pending the permission of his guardian. This ruling is based on the view that discernment implies understanding the nature of trading, and is sufficient to establish serious intent. In this case, the guardian has an option to permit the transaction if he deems it beneficial, or to void it. However, the guardian is not allowed to permit any transaction with gross injustice in exchange.

<sup>3</sup>Narrated by ‘Aḥmad, ‘Abū Dāwūd and Al-Ḥākim on the authority of ‘Abdullāh ibn ‘Amr.

<sup>4</sup>Only verbal actions can be subject to interdiction, since physical actions cannot be made to vanish after witnessing them. In contrast, verbal actions are legal rather than physical entities, and they require a valid intention for their legal consequences to be considered, c.f. ‘Ibn Al-Humām ((Hanafi), vol.7, p.311).

<sup>5</sup>Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.161).



- The Shāfi'īs and Ḥanbalīs ruled<sup>6</sup> that the financial dealings of all children are invalid, regardless of discernment.

In this regard, the Shāfi'īs ruled that the actions of a discerning child are accepted in giving permission to enter a house, and delivering gifts. They also considered a discerning child's state of ritual purity for pilgrimage (*'iḥrām*) valid if approved by his guardian, and considered his acts of worship valid. Moreover, they ruled that discerning children get rewarded the same as adults for removing impediments from the road, and may join Islām at an early age like ʿAlī (mAbpwh).

The Ḥanbalīs ruled that the dealings of a discerning child are valid if authorized by his guardian. Thus, his interdiction is released to the extent for which he is authorized to trade or acknowledge liability.

All four schools agreed that young children are responsible for monetary compensations for any property or life they may destroy.

In summary, the Ḥanafīs and Mālikīs render the contracts and acknowledgements of the young and the insane as non-executable, while the Shāfi'īs and Ḥanbalīs render them invalid.

### 97.1.2 Withholding the child's property

Jurists are in agreement that the young should not be given control over their property until they reach puberty and discernment.<sup>7</sup> This ruling is based on the two conditions of attainment of legal age and discernment stipulated in the verse: “Make trial of orphans until they reach puberty, if then you find them of sound judgment, release their properties to them” [4:6], both of which must thus be observed.

In this regard, a child may reach puberty with or without attaining discernment:

- If the child reaches puberty and discernment with which he can guard his property, his interdiction is released, and he is thus given control over his property.<sup>8</sup> This ruling is based on the above cited verse [4:6], which also dictates that the act of forwarding the child's property to him must be witnessed: “When you release their property to them, take witnesses in their presence” [4:6]. However, jurists differed in opinion regarding whether or not a court ruling is required for the removal of interdiction:

<sup>6</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.166,170), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.431).

<sup>7</sup>Ibn Qudāmah (, vol.4, p.457 onwards;471), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.330), Al-Kāsānī ((Ḥanafī), vol.7,p.170), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.277).

<sup>8</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.331), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.166,170), 'Ibn Qudāmah (, vol.4, p.457), Al-Kāsānī ((Ḥanafī), vol.5, p.154; vol.7, p.170 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.195), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.277).



- The Ḥanafīs, Ḥanbalīs, and most Shāfiʿīs ruled<sup>9</sup> that the interdiction of a child is removed upon attaining puberty and discernment, without the need for a court order. This ruling is based on the view that interdiction is established without a court order, and thus may be removed without one, in analogy to interdiction of the insane. The minority Shāfiʿī opinion was that a court order is necessary, since removal of interdiction requires judgment and testing of the interdicted, in analogy to the interdiction of the mentally incompetent. In this regard, the majority opinion seems more appropriate for existing circumstances, and it avoids unnecessary complications of procedure.
- The Mālikīs distinguished between the rulings for males and those for females.<sup>10</sup> For males, they considered three cases:
  - \* If the child's father is alive, then his interdiction is removed once he reaches puberty, without need for a court order, provided that he is not deemed mentally incompetent and his father does not interdict him.
  - \* If his father died and he has a plenipotentiary, then he may only be released from interdiction through a test of discernment. In this regard, if the plenipotentiary was selected by the father, then he may test the child without a need for court permission. This ruling follows from the fact that interdiction in this case would have been established without a court order, and thus may be removed without one. On the other hand, 'Ibn Juzayy stated that if the plenipotentiary was appointed by a judge, then he may not test the child for discernment without the judge's permission. On the other hand, the better opinion is that chosen by Al-Dardīr, which stipulates that a court order is not necessary regardless of whether the plenipotentiary was appointed by the father or a judge. The plenipotentiary then needs to say before respected witnesses that he had tested the child, determined that he was discerning, and thus released him from interdiction. On the other hand, it is always possible for a judge to release any individual from interdiction if he has sufficient proof of his discernment.
  - \* If the child reaches puberty without having a father or plenipotentiary, then he is assumed to be discerning until proven otherwise.

In summary, a court order is not required for releasing a child from interdiction once he reaches puberty, whether he is interdicted by his father or the father's chosen plenipotentiary. However, a public announcement of discernment is necessary if he was under the supervision of a plenipotentiary, but not required

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<sup>9</sup>ibid.

<sup>10</sup>Al-Dardīr ((Mālikī)A, vol.3, pp.296-8), Al-Dardīr ((Mālikī)B, vol.3, p.383), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.277), 'Ibn Juzayy ((Mālikī), p.321).



if his father was alive. In the case of a court-assigned plenipotentiary, 'Ibn Juzayy ruled that a court order is necessary to remove the interdiction, while the more appropriate ruling issued by Al-Dardīr stipulated that such a court-order is not necessary.

– If the child is female, then:

- \* If her father is alive, then she is released from interdiction if her father declares her discernment, if she attains puberty and witnesses declare that she is discerning, or if she is married and the marriage is consummated. In the first instance, the father may simply tell the girl that he has determined that she is discerning and thus removed her interdiction, without need for witnesses.
- \* If the interdicted girl is under the supervision of a plenipotentiary, then she may only be released from interdiction unless five conditions are attained: (i) reaching puberty, (ii) attaining discernment, (iii) having proof of discernment, (iv) having married and consummated the marriage, and (v) being officially released by the plenipotentiary through an official declaration of discernment. This ruling applies regarding of whether the plenipotentiary was appointed by the girl's father or by a court order. Thus, no court order is required for a woman to be released from interdiction

In this regard, the majority opinion agrees with that of the Mālikīs, since they stipulated that a court order is required to release a child from interdiction only if the child was under the judge's supervision. In the latter case, the child's discernment must be declared by the judge, in the same manner that a child under the supervision of a plenipotentiary needs his plenipotentiary to declare his discernment to be released from interdiction.

In summary, the non-Shāfi'īs stipulated two conditions for a child to be released from interdiction: (i) permission of his guardian to trade, and (ii) attaining puberty and discernment. In contrast, the Shāfi'īs require only that the child reaches puberty.

- On the other hand, if the child reaches puberty without attaining discernment, then he should not be given control over his property. In this case, jurists of all schools agree that the non-discerning man or woman would be interdicted on the basis of mental incompetence, following the verse: "Make trial of orphans until they reach puberty, if then you find them of sound judgment, release their properties to them" [4:6].

However, 'Abū Ḥanīfa ruled<sup>11</sup> that if a child reaches puberty without attaining discernment, he remains under interdiction only until he reaches the age of twenty-five. At that age, he is then given control over his property, since interdicting him past this age would compromise his dignity. He

<sup>11</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.171), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.316), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.195), 'Abd Al-Qḥanī Al-Maydānī ((Ḥanafī), vol.2, p.69).



also based this ruling on the verse: “Come not near to the orphan’s property except in the best of ways, until he attains the age of full strength” [17:34]. In this regard, the man would certainly have attained full strength at the age of twenty-five (when he could biologically be a grand-father). Moreover, he argued that interdiction is mainly for education and disciplining, which are inappropriate beyond that age. Hence, there is no benefit to withholding the man’s property beyond that age, and it must thus be given to him.

On the other hand, ‘Abū Yūsuf, Muḥammad, and the principal jurists of all schools ruled<sup>12</sup> that reaching puberty without attaining discernment is not sufficient to release the child from interdiction. Thus, they ruled that he must remain under interdiction until his discernment is ascertained, even if he were to reach sixty years of age under interdiction. They based this ruling on the verse: “If then you find them of sound judgment, release their properties to them” [4:6], which stipulates two conditions: (i) reaching puberty, and (ii) attaining discernment. Thus, a ruling with two preconditions cannot take effect without both conditions being satisfied. Further proof is provided by the previous verse: “To those weak of understanding, make not over your property” [4:5], meaning “their property”.

### 97.1.3 Reaching puberty

Puberty may be ascertained through physical signs, or through attaining a particular age. In this regard, different schools of jurisprudence stipulated different physical signs that establish puberty:

- The Ḥanafīs ruled<sup>13</sup> that a male child is known to have reached puberty once he starts ejaculating in his sleep or otherwise, and thus may impregnate a woman. As proof, they relied on the verse: “But when children among you being to ejaculate, let them ask for permission” [24:59]. They found further proof in the Ḥadīth: “Three are not accountable for their actions: a boy until he begins to ejaculate...”<sup>14</sup> In this regard, ‘Abū Dāwūd narrated that ‘Alī ibn ‘Abī Ṭālib said: “I memorized a saying of the Prophet (pbuh) that ‘A child is no longer an orphan once he begins to ejaculate’.”

For girls, puberty is determined on the basis of menstruation (or pregnancy). This ruling is based on the Ḥadīth narrated by the five major

<sup>12</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.277), ‘Ibn Juzayy ((Mālikī), p.321), Al-Dardīr ((Mālikī)A, vol.2, p.298), ‘Abū-‘Ishāq Al-Shūrāzī ((Shāfi‘ī), vol.1, p.331), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, pp.166,170), ‘Ibn Qudāmah (, vol.4, p.457 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.440).

<sup>13</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.171), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.107), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.203), ‘Ibn Al-Humām ((Ḥanafī), vol.7, p.323).

<sup>14</sup>Narrated by ‘Aḥmad, ‘Abū Dāwūd, Al-Nasā‘ī, ‘Ibn Mājah, and Al-Ḥākim on the authority of ‘A’ishā as: “the boy until he grows up”. However, another narration in ‘Aḥmad, ‘Abū Dāwūd, and Al-Ḥākim on the authorities of ‘Alī and ‘Umar explicitly state “the boy until he begins to ejaculate (*yaḥtalim*)”, c.f. Al-Ḥafīẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.161 onwards).



narrators of Ḥadīth with the exception of Al-Nasā'ī: "Allāh does not accept the prayer of a woman who has begun menstruating but prays with an uncovered head".<sup>15</sup>

The Ḥanafīs stipulated that the minimum age of puberty for boys is twelve, and the minimum age of puberty for girls is nine. The majority of Ḥanafīs ruled that children (boy or girl) are considered to have reached puberty by age fifteen, regardless of whether or not they have shown physical signs thereof. However, 'Abū Ḥanīfa stipulated the age of eighteen for boys, and seventeen for girls for legal puberty, since he argued that those are the ages by which it is determined whether the child is incapable of ejaculating or menstruating.

- The Mālikīs ruled<sup>16</sup> that there are seven physical signs of reaching puberty, five of which pertain to boys and girls, and two of which are specific for girls. The two signs for girls alone are menstruation and pregnancy. The five common signs are ejaculation (asleep or awake), rough pubic hair, body odor in the pubic area, flaring of the nostrils, and changes in the voice. A proof for using pubic hair as a sign of puberty is provided by the Ḥadīth narrated by Al-Tirmidhī on the authority of Samurah that the Prophet (pbuh) said: "Kill the grown men among the polytheists, but spare their children who have not yet grown pubic hair".

The majority of the Mālikīs further ruled that if no physical signs of puberty have appeared by age eighteen, the child is deemed to have reached puberty. A minority specified the default age as that of seventeen.

- The Shāfi'īs ruled<sup>17</sup> that puberty is ascertained either by reaching the age of fifteen lunar years, ejaculation after the age of nine, or the growing of rough pubic hair that requires removal. On the other hand, they did not specify the growth of armpit hair or facial hair as signs of puberty, since they are rare in children under the age of fifteen. In addition, they specified menstruation and pregnancy as signs of puberty in women.

Their selection of age fifteen as a demarcation is based on the narration on the authority of 'Ibn 'Umar that the Prophet (pbuh) did not authorize him at the age of fourteen, ruling that he had not yet reached puberty; and then authorized him on the day of the battle of the ditch at the age of fifteen, ruling that he had reached puberty".<sup>18</sup>

<sup>15</sup>Also narrated by 'Ibn Khuzaymah in his *Ṣaḥīḥ* on the authority of 'A'isha, and the reference to acceptance of prayers is indication that this is the physical sign determining puberty and Legal accountability, c.f. Al-Shawkānī (, vol.2, p.67).

<sup>16</sup>Al-Dardīr ((Mālikī)A, vol.3, p.293).

<sup>17</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.166 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.330).

<sup>18</sup>Narrated by 'Ibn Ḥibbān, and it was also narrated in Al-Bukhārī and Muslim and the major narrators of Ḥadīth. Al-Shāfi'ī said that the Prophet (pbuh) returned seventeen companions at the age of fourteen, ruling that they had not reached puberty, and then authorized them when they were fifteen. Among them, he said, were Zayd ibn Thābit, Rāfi' ibn Khudayj, and 'Ibn 'Umar.



- The Ḥanbalis ruled exactly in accordance with the Shāfiʿī rulings.<sup>19</sup>

#### 97.1.4 Discernment

The Ḥanafīs, Mālikīs, and Ḥanbalīs defined discernment<sup>20</sup> as the ability to protect and manage one's property to one's benefit, even if the discerning individual does not act in accordance with Islamic Law. They based this ruling on the verse: "If then you find them of sound judgment, release their properties to them" [4:6], which 'Ibn ʿAbbās explained as referring to their ability to use their property to their benefit. Thus, interdiction is established to protect the property of the interdicted, and once he is capable of protecting and managing his own property, he must be given control thereof.

In contrast, the Shāfiʿīs ruled<sup>21</sup> that discernment refers not only to the ability to manage one's property for one's own benefit, but also refers to adherence to Islamic teachings. Thus, a person is considered non-discerning if his sins outweigh his good deeds, if he wastes his property in excessively unjust trades, or if he spends his property in forbidden ways. Thus, a child must remain under interdiction if he fails to satisfy the financial or the religious requirements of discernment. On the other hand, most Shāfiʿīs ruled that excessive spending on charity or spending on food and clothes that do not suit the person's social status do not render the person a spendthrift who should be interdicted.

In this regard, they ruled that a guardian or plenipotentiary must test the child's discernment as per the verse [4:5] in both respects: the financial and the religious. In this regard, discernment in religious matters can be ascertained by observing the child's performance of obligatory acts of worship, avoidance of forbidden and suspicious acts, and keeping good company. Discernment in financial affairs can be ascertained by testing the child in the area wherein he is most likely to work; e.g. agriculture, trade, etc. In this regard, the test should be repeated twice or more before and/or after reaching puberty.

#### 97.1.5 Guardians and plenipotentiaries

The guardian or plenipotentiary of an interdicted individual has the legal power to deal in that individual's property without seeking anyone's permission. In this regard, jurists of all schools agree that the father of an interdicted person is his guardian if he is alive. However, jurists of the different schools differed in the order of guardianship if the father is not alive:

- The Ḥanafīs ruled<sup>22</sup> the order of guardianship is: the child's father, then

<sup>19</sup> 'Ibn Qudāmah (, vol.4, pp.359-461), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.432).

<sup>20</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.170), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.105), 'Ibn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, p.278), 'Ibn Qudāmah (, vol.4, p.467), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.433).

<sup>21</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.169-170), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.331).

<sup>22</sup> 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.122), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.220), Al-Kāsānī ((Ḥanafī), vol.5, p.155).



his plenipotentiary when he dies, then the plenipotentiary's plenipotentiary, then his paternal grandfather, then his plenipotentiary, then his plenipotentiary, then the ruler, then the judge or his plenipotentiary. This order was based on the degree of care for the child's wellbeing. Thus, the father is deemed as the most caring for the child, and his plenipotentiary is assumed to be more caring than the grandfather since he is selected by the father. Moreover, the grandfather's degree of care is considered higher than that of a judge, due to being a family member. This is the ordering for financial affairs, but there is another ordering of guardianship in matters pertaining to marriage.

On the other hand, brothers, uncles, mothers and their plenipotentiaries, and other similar relatives are not permitted to supervise the property of the interdicted, or to authorize a young child to trade.

- The Mālikīs ruled<sup>23</sup> that the order of guardianship for a child or a mentally incompetent person whose incompetence did not ensue after reaching the age of puberty<sup>24</sup> is thus: his discerning father, then his plenipotentiary, then the ruler if there is one, otherwise the Muslim society as a whole. Thus, they do not establish guardianship in financial affairs to grandfathers, brothers, or uncles, unless the father appoints one of those individuals as a plenipotentiary.
- The Shāfi'īs ruled<sup>25</sup> that the order of guardianship of a child is thus: his father, then his grandfather, then the plenipotentiary of the father or the grandfather whoever is later to die, then the judge or his deputy. The last category is based on the Ḥadīth: "The Ruler of Muslims is the guardian of anyone who lacks a guardian".<sup>26</sup> Thus, they do not establish guardianship for siblings, uncles, or mothers in the opinion of most Shāfi'īs. This order applies both for guardianships in financial matters as well as marriage.

This Shāfi'ī ordering seems to be the most appropriate, since he questioned the Ḥanafī assumption that a father's plenipotentiary who is not a relative cares more for the child than his grandfather. He asserted that family relations are the strongest incentives to care for the wellbeing of young children.

- The Ḥanbalīs ruled<sup>27</sup> in agreement with the Mālikīs that the order of guardianship of interdicted individuals is: his father, then the father's plenipotentiary, then the ruler. However, they ruled that if interdiction is renewed after a person reaches puberty, then guardianship goes to the

<sup>23</sup>Al-Dardīr ((Mālikī)A, vol.3, p.299), Al-Dardīr ((Mālikī)B, vol.3, p.389 onwards).

<sup>24</sup>On the other hand, if mental incompetence ensued after reaching puberty, guardianship goes to the ruler rather than the father.

<sup>25</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.173 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.328).

<sup>26</sup>Narrated by Al-Tirmidhī who deemed it good (*hasan*), and Al-Ḥākim who deemed it valid.

<sup>27</sup>Ibn Qudāmah (, vol.4, p.471), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.434).



ruler. The final ruling is based on the view that establishing or dissolving interdiction after having reached puberty requires a court-order, and thus all financial affairs during interdiction must also require a court's supervision.

### 97.1.6 Guardian dealings in a child's property

Jurists agree that a guardian must only deal in the child's property in ways that benefit and do not harm the child. This ruling is based on the verses: "Come not near to the orphan's property except in the best of ways, until he attains the age of full strength" [17:34], and "If you mix their affairs with yours, they are your brothers, and Allāh knows the man who means mischief from the one who means good" [2:220]. Moreover, they agreed that a rich guardian should not consume any of the property of an orphan, and a poor guardian must only consume a modest amount, following the verse: "If the guardian is well off, let him claim no remuneration, but he is poor, let him have for himself what is just and reasonable" [4:6]. In this regard, Al-Bukhārī and Muslim narrated on the authority of ʿA'ishā that she ruled that the guardian of an orphan must only consume a reasonable compensation for his efforts of guardianship. It was also narrated that a man told the Prophet (pbuh): "I have no property, and I am the guardian of an orphan". The Prophet (pbuh) then told him: "Consume out of the property of the orphan for whom you care, without overspending or using it to enrich yourself, and do not use his property instead of using your own".<sup>28</sup> In what follows, we shall list the rulings in each juristic school for the meaning of dealing in the child's property only for his benefit.

#### Ḥanafī rulings

The Ḥanafīs ruled<sup>29</sup> that guardian is not permitted to give any of the child's property in charity, since that is a pure financial loss for the child. They thus ruled that the child's guardian is banned from using the child's property in all pure contributions without compensation, such as lending it, naming it in a will, giving in charity, divorcing his wife, etc. 'Abū Ḥanīfa and 'Abū Yūsuf also ruled that the guardian is not allowed to give the child's property as a gift for which there is a compensation. The latter ruling is based on the view that a compensated gift begins as a gift, for which the guardian is not authorized, and only becomes a commutative transaction later. In contrast, Muḥammad ruled that compensated gifts are permissible, since they are in reality a form of sale. However, a judge is authorized to lend the property of an orphan, since such practices help member of society to repay their debts.

On the other hand, a guardian is authorized to accept gifts, charity and inheritance on behalf of the child, since such dealings are of pure financial benefit

<sup>28</sup>Narrated by 'Abū Dāwūd, Al-Nasā'ī, 'Aḥmad, and 'Ibn Mājah on the authority of ʿAbdullāh ibn ʿAmr, c.f. Al-Shawkānī (, vol.5, p.251).

<sup>29</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.153 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.499 onwards), Majma' Al-Ḍamānāt (p.408).



to the child. Thus, bringing benefit to the child is good, since the Prophet (pbuh) said: “The best of people are those who are of the most benefit to other people”.<sup>30</sup> It is also ruled by juristic approbation that a guardian is authorized to give the child’s property as a simple loan, and he is authorized to deposit it or pawn it in lieu of his own debt. The latter ruling follows from the fact that the pawned property will thus remain intact in the creditor’s possession. However, if the pawned property were to perish, then the guardian must compensate the child for the value of the pawned property with which he insured his own debt.

A guardian is also allowed to sell the child’s property for more than its value, or to buy property on his behalf below its value. All such dealings are allowed since they are of pure financial benefit to the child. Moreover, the guardian is allowed to sell the child’s property at or slightly below its value, and to buy on his behalf at or slightly above the property’s value. In this regard, slight variations in price are determined by convention.

Similarly, the guardian is allowed to lease the child’s labor or properties for its market rate, above it, or slightly below it as determined by convention. He is also allowed to lease properties on behalf of the child at the market rate, below, or slightly above as determined by convention. If the guardian leased the child’s labor after he reaches puberty, then the child has the option to allow the hire contract or void it. On the other hand, the child is not given any option in the leasing of properties, since the guardian’s actions are assumed to be for the child’s benefit, and thus are executed.

The guardian is also allowed to travel with the child’s property, use it in silent partnerships, and assign agents to trade in it or lease it. This ruling follows since all such dealings are derivative forms of trading.

However, only guardians who are known to be of good character and sufficient wealth are allowed to sell a child’s immovable property (e.g. real estate), and then only if he sells it for its value or above. Moreover, the guardian may not sell the child’s immovable property to himself unless it is necessary to repay a debt that could not be paid otherwise. This is indeed the best accepted opinion. In this case, the guardian’s sale requires a judge’s permission to be executed, and the judge may void the sale for the benefit of the child.

If the guardian is the child’s father or grandfather, then he may buy or sell the child’s property to himself, as long as the price is in the child’s favor or very close to the property’s value. Such trading also requires a judge’s permission to be executed, and the judge is allowed to void the sale for the benefit of the child.

Muḥammad ruled that a plenipotentiary is not allowed to buy or sell the child’s property to himself. On the other hand, ‘Abū Ḥanīfa and ‘Abū Yūsuf allowed such trading only if it is beneficial to the child, in the sense of buying from him at a higher, and selling him at lower, than the market price.

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<sup>30</sup>This is a good Ḥadīth, narrated by Al-Qaḍā‘ī on the authority of Jābir ibn ‘Abdullāh.



**Mālikī rulings**

The Mālikīs ruled<sup>31</sup> that a guardian may deal in the child's property as long as the dealings are beneficial to the child. Thus, a father is allowed to trade in any property of his interdicted child, movable or immovable, and he does not need to justify the trade to anyone. He is also allowed to give the child's property as a compensated gift. Those rulings follow from the fact that a father is assumed by default to deal only in the best interest of his child.

In contrast, they restrict a plenipotentiary from selling a child's immovable property unless there is good reason for it. Similarly, he is only allowed to use the interdicted individual's property in a compensated gift unless there is good reason for it. The latter ruling follows from the fact that were the property given in gift to perish, the guardian would only be responsible for its value on the day it perished, which may be lower than its value on the day it was given in gift, hence harming the orphan financially. The Mālikīs also ruled, in agreement with the Ḥanafīs in principle, that the ruler like the plenipotentiary may only sell the property of interdicted individuals out of necessity (e.g. to spend on him or repay his debts).

The Mālikīs enumerated eleven reasons that may justify a plenipotentiary or ruler to sell immovable property of a young child:

1. If there is a clear need to sell the property in order to spend on the child, or to repay a debt that cannot be paid without selling the property.
2. Fear that a transgressor may usurp the property or its income, and there is no way of protecting the property from the transgressor.
3. An obvious benefit by selling the property at a price that exceeds its market value by one third or more.
4. Selling a property with excessive taxation to replace it with one with lower taxation, unless the former also yields a higher income.
5. If the child co-owned a property with others, and his share was sold to buy him another property in which he does not share with others.
6. If the property yields small or no income, and is sold to buy one that yields a higher income.
7. If the child's property was adjacent to bad or non-Muslim neighbors, and was sold to buy him another with good Muslim neighbors.
8. If the child shared ownership of indivisible property, and the partner sold his share, then the child's share will have to be sold simultaneously.
9. If the property was subject to fast deterioration, and the child had no money with which it can be restored, the property may thus be sold.

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<sup>31</sup> Al-Dardīr ((Mālikī)A, vol.3, pp.299,302 onwards), Al-Dardīr ((Mālikī)B, vol.3, pp.390,393-5), 'Ibn Juzayy ((Mālikī), p.322).



10. If the property was subject to fast deterioration, and it was deemed more economical to sell it than to restore it.
11. If the property was a house and the area became subsequently deserted.

### Shāfiʿī rulings

The Shāfiʿī is ruled<sup>32</sup> that the guardian must deal in the child's property only for the latter's benefit. Thus, he must protect the child's property and invest it to protect it from diminution due to expenditures on the child. In this regard, the Arabic language of the verse: "To those weak of understanding, make not over your property which Allāh has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice" [4:5] explicitly suggests that the guardian should feed the child out of the income from his property, rather than consume the property itself. In this regard, the Prophet (pbuh) is narrated to have said: "If someone becomes the guardian of an orphan, he must trade with his property to prevent it from being eaten up by the obligatory charity payments".<sup>33</sup> In this regard, the guardian must invest the child's wealth in the best possible way, attempting to secure investments with a guaranteed stream of income. He must thus avoid buying perishable goods on his behalf, even if the trade is profitable. Moreover, the guardian is allowed to travel with the wealth of the interdicted child or insane person, provided that travel is safe and beneficial for the latter.

They also ruled that the guardian is allowed to sell immovable property of the child in one of two conditions. The first is if the income stream is insufficient to feed and clothe the child, and it is not possible or beneficial to borrow for that purpose, or if the guardian fears that the property's destruction is eminent. The second condition under which a guardian may sell the child's property is when it can be sold for a significantly higher price than its comparables, or if the price can be used to buy a similar property with lower taxes and equal or greater income.

The guardian is allowed to exchange the child's property for other property both immediately and with deferment, provided that deferment is beneficial financially or due to increased security. If the guardian does sell the child's property with deferment, the sale must be witnessed, and sufficient pawning must be secured. It is further required that the buyer in this case be creditworthy, and that the term of deferment is short. All of the above requirements are intended to protect the rights of the interdicted party. If the guardian deviates from those security measures, he must guarantee the property for the child, and most Shāfiʿīs ruled that the sale would be considered invalid.

The guardian is also not permitted to deposit the child's property or lend it unless it is necessary to do so. This ruling follows from the fact that such actions would put the property in the possession of another, and thus endangers

<sup>32</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, pp.174-6), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, pp.328-30).

<sup>33</sup> Narrated by Al-Tirmidhī on the authority of ʿAbdullāh ibn ʿAmr ibn Al-ʿĀṣṣ.



it. On the other hand, the guardian is required to pay the obligatory charity tax (*zakāh*) from the child's property, since he takes his place in such obligations. Finally, the guardian must spend moderately on the child's food and clothing out of his property and its income, earning sins if he under-spends on him, and earning sins and guaranteeing the property if he over-spends.

If upon reaching puberty the child claims that his father or grandfather sold his property without any benefit to him, the father or grandfather's claim is accepted if they support it with an oath. In this case, the default view is that fathers and grandfathers act in the best interest of the child, and thus their denial of an accusation to the contrary is accepted based on their oath. In contrast, the child's charge is accepted if the accused party was a plenipotentiary or a judge's appointee. The same distinction underlies the ruling that a father or grandfather is permitted to trade the child's property for their own, while the same is not permitted for other guardians or plenipotentiaries. Proof for this ruling is provided by the Ḥadīth: "A plenipotentiary is not allowed to trade the orphan's property for his own".<sup>34</sup>

### Ḥanbalī rulings

The Ḥanbalīs ruled<sup>35</sup> in a very similar manner to the Shāfi'īs. Thus, they ruled that a guardian may only trade in the property of a child or insane person to their advantage, as per the verse [17:34]. Thus, if the guardian gives their property in a gift or charity, or if he buys for a high price or sells for a low price, he must compensate them in analogy to one who deals in the property of another without his permission. On the other hand, the guardian is authorized to pay for the expenses of the interdicted child or insane person out of their property without need of a court permission.

They also ruled that guardians, plenipotentiaries, and rulers are not allowed to trade or pawn the property of an interdicted child or insane person for themselves. This ruling is based on suspicion regarding the intentions of all such parties. The only exception is that of the guardian who is a father, for fathers are authorized to conduct such dealings since their concern for their children is beyond suspicion.

A guardian is also responsible for the payment of obligatory charity from the property of the interdicted. However, he is not authorized to acknowledge their liability for property or compensation, since that would be deemed acknowledging the liability of another.

A guardian is also allowed to travel with the property of the interdicted to trade for their benefit, provided that it is safe to do so. The guardian is also allowed to trade with the property of the interdicted himself, but he is not entitled thus to any wage or profit-share. This permissibility is necessary to allow the wealth to grow and prevent it from being eaten by obligatory charity, as stated by 'Umar. The guardian is also allowed to give the property to an

<sup>34</sup>Narrated by Al-Ṭabarānī with a good chain of narrators on the authority of 'Ibn Zufar on the authority of 'Ibn Mas'ūd, c.f. Al-Haythamī (, vol.4, p.214).

<sup>35</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.435-9).



entrepreneur in a silent partnership, and the profit share for the capital should all go to the interdicted owner.

A guardian is also allowed to sell the property of the interdicted with deferment, provided that the debtor is creditworthy and the trade is beneficial in the sense of being at a high price, or if keeping the property would expose it to dangers of theft or destruction. In this case, the guardian does not need to collect a pawned property or have a guarantor as insurance against the debt in lieu of the deferred price. However, if a loss were to ensue from that dealing, the guardian is not responsible to compensate the interdicted, even though he did not take a pawning or a guaranty in lieu of the debt, since the bad outcome was not likely at the outset.

A guardian is also allowed to deposit the property of the interdicted with a trustworthy party, or to lend it to a creditworthy party if that protects it by putting it in the possession of guaranty of a creditworthy party. In such cases, the guardian is not responsible to compensate the interdicted if the property were to perish, since he is not considered negligent in those cases. In this regard, a father is allowed to lend the child's property to himself, while a plenipotentiary or ruler is not allowed to do so, since the former is beyond suspicion while the latter are.

A guardian is also allowed to give the interdicted property in a gift for which a more valuable compensation is given. He is also allowed to pawn it with a trustworthy party if that is necessary to ensure a debt. Moreover, the guardian is allowed to buy or build real estate on behalf of the interdicted for usage.

The guardian of a child may further teach him writing, marksmanship, and other beneficial skills. He may thus collect wages for his teaching from the property of the interdicted, since such education benefits him.

He may also deliver the interdicted for work, or to medicate him if he gets sick, without need for the ruler's permission to engage in such dealings.

Finally, they ruled that a guardian may sell an immovable property of the interdicted if the sale is beneficial financially or otherwise. In this regard, the list of benefits that can justify selling an immovable property of the interdicted includes:

- The need to spend on the child's food and clothing, or to repay his debts, if that requires selling the property.
- If the immovable property was exposed to a realistic risk of destruction.
- If the property is sold for a price that is significantly higher than its market value. In this regard, the Ḥanbalīs did not use the one third rule to determine what prices are considered "significantly" higher.
- If the interdicted property was at a location that limited its usefulness, and was thus sold to buy a better located and more useful property.
- If the guardian recognizes a bargain purchase that he can make on behalf of the interdicted, but can only afford its price by selling the property.



- If the property was a house in a bad neighborhood, or was otherwise limited in its benefits, and can only be sold at its market price.

### 97.1.7 Authorizing the interdicted

Authorization of an interdicted person implies releasing him from interdiction, thus allowing him to deal in his property freely, and dropping the guardian's right to prevent such dealings. Jurists agree that authorization of an interdicted person based on attaining puberty and discernment requires testing, as per the verse: "Make trial of orphans until they reach puberty" [4:6]. Testing children is accomplished by giving them temporary permission to deal as his equals do, in trading or agriculture, etc.<sup>36</sup>

On the other hand, jurists differed in their rulings regarding an underage child who is authorized by his guardian to trade, and the consequences of the permission:

- The Shāfi'īs ruled<sup>37</sup> that an underage child cannot be authorized to trade. However, they said that he may be given some of his property to test his financial understanding. Then, if the child wishes to conduct a contract, the guardian must conduct the contract on his behalf. This ruling follows from their view that the dealings of the underage child are rendered invalid by his lack of discernment. In contrast, they ruled that when a mentally incompetent person is tested, he may be authorized to conduct his own contract if he can prove his discernment.
- The Ḥanafīs, the majority of Mālikīs, and the majority of Ḥanbalīs ruled<sup>38</sup> that a guardian may authorize a young child to trade if he is satisfied with his level of understanding, to train him thus. They based this ruling on the verse [4:6], and argued that the children can only be tested by being authorized to trade. Thus, they argued that a discerning child may be authorized to trade, and his dealings then become valid. However, if the young child were to deal without his guardian's authorization, the Ḥanbalīs render his dealings invalid, while the Mālikīs and Ḥanafīs render them non-executed. The latter opinion is the more appropriate and logical, since it agrees with the nature of training a person to conduct rational dealings.

In this regard, the Ḥanafīs and Mālikīs allow the guardian's authorization to be explicitly verbal, or implicit (e.g. by noticing the child trading, and not forbidding him). The latter ruling means that the guardian's silence in this case is considered an implicit consent and authorization, lest his silence may be financially harmful to the other side in the transaction he witnessed. On the other hand, the Ḥanafī jurist Zufar and the Ḥanbalīs

<sup>36</sup>Ibn Qudāmah (, vol.4, p.478).

<sup>37</sup>Al-Khatīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.170).

<sup>38</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.108-111), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.203 onwards), Al-Kāsānī ((Ḥanafī), vol.7, p.194 onwards), Al-Dardīr ((Mālikī)A, vol.3, pp.294,303 onwards), Al-Dardīr ((Mālikī)B, vol.3, pp.384,396), Ibn Qudāmah (, vol.4, p.468), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.445).



ruled that only explicit authorizations are established, since silence may indicate consent or rejection.

The different juristic schools also differed in opinion regarding the effects of authorization in this context:

- The Ḥanafīs ruled that authorization of the interdicted is a release from interdiction, and not a mere agency. Thus, even if the interdicted child is authorized to perform a specific trade (in terms of time, type, or place), the authorization is considered unrestricted. This follows from the view that authorization is a drop of the guardian's right, and dropping of right cannot be restricted. Thus, once an interdicted party is authorized to perform a single trade, he is thus free to engage in all trades and other dealings that may result in gains or losses, including investment, pawning, and leases. However, the interdicted who was authorized to trade remains to be barred from engaging in purely harmful dealings such as gift-giving, charity, lending, and guaranty.

'Abū Ḥanīfa further ruled that an interdicted party who was authorized to trade is allowed to trade at prices that differ significantly from market prices. He based this ruling on the view that once authorized, he becomes fully eligible to trade at any prices. In contrast, 'Abū Yūsuf and Muḥammad ruled that the newly authorized party is not allowed to trade at prices that differ markedly from the market. They based their ruling on the view that the difference between the trading price and the market counterpart may be viewed as a pure contribution, for which the authorized trader was not authorized. The latter dealing seems most appropriate, since such trading away from market prices involves a significant harm to the trader, and he was not thus authorized.

- The Mālikīs agree with the Ḥanafīs regarding the dealings of an interdicted party who was authorized to trade. However, they agreed with 'Abū Yūsuf and Muḥammad that the person thus authorized is not authorized to trade at prices that differ markedly from their market counterpart.
- The Ḥanbalīs ruled that authorization of an interdicted person to trade is tantamount to an agency. Thus, they consider the interdicted person to be released from interdiction only for the task that his guardian authorized. For instance, if the guardian authorizes him to trade up to \$100, all dealings beyond that amount are deemed invalid. Similarly, if he is authorized to trade in a specific commodity, trading in any other would be deemed invalid. However, they ruled that the authorized trader in this case differs from agents in the fact that he is authorized to trade with deferment or non-monetary non-fungibles, in analogy to entrepreneurs in silent partnership rather than trading agents. This ruling follows from the view that the objective of authorization is profit, which is the foundation of analogy to silent partnerships.



Moreover, they ruled that a discerning child who was authorized to trade up to a certain amount is thus authorized to acknowledge liability up to that amount. However, he is not allowed to appoint an agent to perform the authorized task.

### Guardian wages

A guardian is not entitled to a wage for his guardianship, care, and investment of the property of the interdicted if he has other sources of wealth. However, if the guardian is poor, and the guardianship activities occupy time he could have used to earn an income, then he may collect a reasonable wage for his activity. In the latter case reasonable wages are determined by convention in the society. This ruling is based on the verse “If the guardian is well off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable” [4:6].

## 97.2 Insane individuals

There are two types of insanity: permanent, and intermittent. While a person is insane, he is treated in the same manner as a non-discerning child, thus losing all legal authority to marry, write wills, trade, etc. Hence, all the legal actions of the insane, worldly and religious, are invalidated due to the lack of valid intent. For instance, his contributions to charities and given gifts are disregarded, and all his trading, acknowledgements of liability, divorces, and other contracts are invalidated based on lack of eligibility. On the other hand, his physical activities are considered. Thus, he is deemed responsible for fathering children, and destroying the property of others. However, in the case of killing an individual, the insane individual is only responsible for paying the financial compensation thereof.

In the case of intermittent insanity, the person’s legal activities are valid and executed during his episodes of sanity. If he is not fully discerning during his episodes of sanity, e.g. if he understands some things but not others, then his actions during such episodes are rendered suspended pending the approval of his guardian, in analogy to the ruling for discerning children. This ruling follows from the fact that his dealings may be harmful or beneficial, and they must be executed if beneficial and invalidated if harmful. The preceding rulings were agreed upon in the Ḥanafī and Mālikī schools.

## 97.3 Idiots

An idiot (*al-ma<sup>c</sup>tūh*) is an individual whose mental condition renders his understanding weak, his speech confused, and his decisions unsound. In this regard, a person may be born as an idiot, or the idiocy may be caused by some disease. Moreover, there are levels of idiocy:



- In extreme cases of idiocy, the idiot is non-discerning. Thus, idiots at that extreme share the same legal status of the insane and non-discerning children, and thus all of their dealings are deemed invalid. That is why many books of jurisprudence have discussed idiocy under the general category of insanity.<sup>39</sup>
- On the other hand, minor idiocy may leave the individual discerning. For such individuals, the Ḥanafīs and Mālikīs render all purely harmful dealings of such individuals invalid, while their beneficial dealings are deemed valid. Dealings of such individuals that may be beneficial or harmful (e.g. trade) are rendered suspended pending the guardian's permission. All Ḥanafī rulings in this regard are thus deduced by analogy to discerning children.<sup>40</sup>

## 97.4 The mentally incompetent

All schools of jurisprudence agree that mentally incompetent (*saḥīḥ*) individuals must be interdicted, just as children and insane individuals are interdicted. In this regard, the general definition of mental incompetence in financial affairs is well-understood. A mentally incompetent person is someone who does not handle his property appropriately, overspends, or spends in unlawful ways. Thus, the Mālikīs designated as mentally incompetent any individuals who spend their money on wine or gambling, trade at unreasonable prices, spend excessively on worldly pleasures, or destroy their property.<sup>41</sup> However, a full discussion of the definition of mental incompetence and its legal consequences in the different schools requires a more elaborate study, which we now undertake:

### 97.4.1 Ḥanafī rulings

The Ḥanafīs defined<sup>42</sup> mental incompetence (*al-saḥāh*) as overspending and wasting property in unreasonable or unlawful ways, even in good causes such as the building of mosques. Such overspending and inappropriate spending include overspending on oneself, performing dealings with no religiously and logically acceptable purpose, and dealing at unreasonable prices without hoping for other benefits from the transaction.<sup>43</sup>

<sup>39</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.170), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.191 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, pp.310-313), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.100 onwards), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.66 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.292), Al-Dardīr ((Mālikī)B, vol.3, pp.382,388), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.165 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.328), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.430 onwards).

<sup>40</sup> 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.100), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.311).

<sup>41</sup> Al-Dardīr ((Mālikī)B, vol.3, p.393).

<sup>42</sup> Al-Kāsānī ((Ḥanafī), vol.7, pp.169,171), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.102 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.195 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.310 onwards), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.68 onwards).

<sup>43</sup> Note that the default ruling is permissibility of most dealings, and being generous to others is lawful. However, overspending in any way is forbidden, based on the verse: "Those



They further defined a mentally incompetent person as one whose mind is weak, resulting in wasting his property without a valid beneficial purpose. However, The Ḥanafis differed in their rulings regarding the legal status of mentally incompetent individuals:

- 'Abū Ḥanīfa ruled that a free and sane individual of legal age may not be interdicted based on mental incompetence, severe indebtedness, acting in non-religious ways, or absent-mindedness. Thus, he renders the financial dealings of mentally incompetent individuals permissible, even if he wastes or overspends his wealth in unbeneficial ways. He based this ruling on the view that interdicting such a sane and free adult degrades his humanity and treats him like an animal. He reasoned in this regard that such a reduction of human beings to the status of animals is more harmful than the financial waste that his dealings may cause. He provided proof for this view through the verse: "To orphans restore their property [when they reach their age], and do not substitute the bad for the good" [4:2].<sup>44</sup>

However, if a child reaches puberty without attaining discernment, 'Abū Ḥanīfa ruled that his property should only be given to him when he reaches the age of twenty five. Moreover, he ruled that if he performs any dealings after puberty and before becoming twenty five, his dealings should be executed based on his eligibility. Once he reaches the age of twenty-five, 'Abū Ḥanīfa ruled that he should be given full control over his property, even if he was not found to be discerning. He based this ruling on the view that interdiction in this case would be meant as a tool of discipline, and it is uncommon to discipline a person above that age (by which time he can physically be a grandfather), and thus interdiction serves no purpose above that age, in his view. This is not the accepted view in the Ḥanafī school.

- 'Abū Yūsuf and Muḥammad ruled that the mentally incompetent, the severely indebted, and the absent-minded may be interdicted, but did not allow interdiction of a sane individual by virtue of violating Islamic Law. Their ruling is the accepted one in the Ḥanafī school, as a means of protecting the property of the mentally incompetent or absent-minded, or the rights of creditors. The major scholars of the other schools agreed with 'Abū Yūsuf and Muḥammad, and based the permissibility of interdicting mentally incompetent individuals on the verse: "To those weak of understanding, make not over your property which Allāh has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice" [4:5]. Thus, Allāh (swt) forbade guardians from giving the mentally incompetent control over their property, which

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who, when they spend, are not extravagant and not niggardly, but hold a just balance between those extremes" [25:67].

<sup>44</sup>Note that this verse is restricted by the later verse: "To those weak of understanding, make not over your property which Allāh has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice" [4:5].



implies preventing them from dealing thereof. Clearly, if they were permitted to deal in their property while it was under the control of their guardians, there would be no purpose in withholding the property, since they would still be able to waste it. Another proof is provided by the Ḥadīth narrated by Al-Ṭabarānī with a valid chain: “Control the dealings of the mentally incompetent among you”.

Moreover, interdicting the mentally incompetent protects their property and thus protects them from poverty. Moreover, interdiction of such individuals protects society by protecting all others who deal with him, as well as preventing the wasting of society’s resources. In this regard, the prevention of harm of any kind is a Legal requirement based on the Ḥadīth: “No harm is permitted (*lā ḍarara wa lā ḍirār*)”.<sup>45</sup>

The Ḥanafīs ruled according to the opinion of ‘Abū Yūsuf and Muḥammad. Thus, they ruled that mentally incompetent individuals have the same rulings as discerning children in all voidable dealings. For instance, trading of mentally incompetent individuals is deemed suspending pending the permission of their guardians. Thus, if a mentally incompetent person trades, his trade is not executed initially, but if it is proven beneficial to him, the ruler or judge may permit it.

On the other hand, the Ḥanafīs rendered the non-voidable activities of mentally incompetent individuals (e.g. marriage and divorce) valid. This ruling in the case of marriage is based on the view that marriage is a basic need for everyone, and cannot be invalidated if the contract language lacked a valid intent. However, if a mentally incompetent person marries and pays an unreasonably high dowry, the excess over the average dowry for similar marriages is voided, since it is not necessary. On the other hand, if he divorces the wife prior to consummation of the marriage, he is bound by one half of the named dowry.

They also ruled that a mentally incompetent person’s will is valid for one-third of his property, provided that it is designated for a good cause such as benefiting the poor, building mosques or schools, etc. This ruling follows from the fact that the will is only executed after the person’s death.

Moreover, they permitted a mentally incompetent person to admit committing crimes with physical punishments (e.g. theft and murder). On the other hand, once interdicted, he is not permitted to acknowledge liability for a financial debt.

A mentally incompetent person is also responsible for the expenditures of his children and wife, as well as any other relatives for whom he is financially responsible. Moreover, he must pay the obligatory wealth tax (*zakāh*). Those rulings follow from the fact that all such payments are rights of other people, which are not invalidated by the person’s mental incompetence.

<sup>45</sup>This is a good Ḥadīth, narrated by ‘Ibn Mājah, Al-Dāraqūṭnī, and others on the authority of ‘Abū Sa‘īd Al-Khudriy. It was also narrated by Mālik in *Al-Muwatta’* with an incomplete transmission on the authority of ‘Amr ibn Yaḥyā on the authority of his father. In this regard, the multiple chains of narration enforce one another.



Finally, all acts of worship performed by a mentally incompetent person are valid, including the obligatory pilgrimage. However, the judge should not allow a mentally incompetent person to handle his own pilgrimage expenses, but should appoint a trustworthy pilgrim to handle his expenses for him, to ensure that his pilgrimage money is not wasted on unnecessary expenditures.

Note that the Ḥanafīs ruled that mentally incompetent and severely indebted individuals may only be interdicted by court order. This is in contrast to the interdictions of small children, insane individuals, and idiots, which do not require a court order.

### 97.4.2 Mālikī rulings

The Mālikīs defined<sup>46</sup> a mentally incompetent individual as one who spends his wealth inappropriately, either because of following his desires without regard to religion, or if he is religiously observant but unable to determine which actions are beneficial to him. Thus, they defined mental incompetence (*al-safah*) as any expenditure of wealth in a manner that disagrees with Islamic Law. In this regard, they ruled that the father of a mentally incompetent child may interdict him around the age of puberty, but a court order is necessary to interdict an adult if his mental incompetence ensued more than a year after reaching puberty.

The majority of Mālikīs ruled that the dealings of an adult male who is known to be mentally incompetent are executed without need for a permission if he was not interdicted and has no appointed guardian. This ruling applies even if he dealt in his property without receiving compensation, and regardless of whether his mental incompetence ensued before or after puberty. Moreover, all Mālikīs agree that if mental incompetence was not known with certainty, then his dealings are executed.

In contrast, the majority of Mālikīs ruled that the dealings of a mentally incompetent child who has no guardian are not executed until he reaches puberty. They also ruled that the dealings of a mentally incompetent adult woman who has no guardian are not executed until she reaches menopause (specified as the age of forty for some, and between fifty and sixty for others) without getting married, or after one year of the consummation of her marriage.

They further ruled that the will of an interdicted mentally incompetent person is executed. His divorce is also executed, whether it is initiated by him or by his wife (in *khuṭ'*). Moreover, they ruled that his admission of guilt for crimes with physical punishments is deemed valid. However, his gifts and charities are not binding on him.

Finally, they ruled that any compensated dealings of an interdicted mentally incompetent individual are thus suspended pending his guardian's permission, in analogy to such dealings in the case of a discerning child. In this regard, the guardian must act on behalf of the interdicted person for the latter's benefit, both in immediate trades and with deferment. Thus the guardian is permitted to

<sup>46</sup> Al-Dardīr ((Mālikī)A, vol.3, p.296 onwards), Al-Dardīr ((Mālikī)B, vol.3, pp.387 onwards, 393), 'Ibn Ruṣḥd Al-Ḥafīd ((Mālikī), vol.2, p.279), 'Ibn Juzayy ((Mālikī), p.321).



forego a preemption right, or a right of physical retaliation for murder. However, the guardian is not permitted to forgive any transgression against the interdicted without collecting the appropriate financial compensation.

### 97.4.3 *Shāfiʿī* rulings

The *Shāfiʿī*s defined<sup>47</sup> mental incompetence as unwise spending of wealth, e.g. by dealing at possibly unreasonable prices, destroying his property, or spending it in religiously inadmissible outlets. In contrast, the majority of *Shāfiʿī*s ruled that spending any amount of property on charity or food and clothing does not qualify as unwise spending in this strict sense. In the case of spending on charity, they ruled that such spending has a valid purpose of attaining other-worldly rewards. Moreover, they argued that it is very difficult to rule that a person spent “too much” on food and clothing, since the purpose of wealth is to derive permissible utility from it.

They ruled that a court order is required for the interdiction of mentally incompetent adult. Thus, the father or grandfather is not authorized to interdict a mentally incompetent son or grandson, since the determination of incompetence requires a legal analysis. Moreover, the judge must witness the interdiction, and if the person were to regain his mental competence, removal of the interdiction also requires the judge’s ruling thus. In this regard, the guardian of a mentally incompetent adult is the judge, since the guardianship of his father elapsed once he attained puberty and discernment. The judge must thus take over as a guardian to protect society’s interests from the mentally incompetent person’s unwise dealings.

They further ruled that a number of dealings of a mentally incompetent adult are valid if authorized by the ruler. Those include marriage, divorce, remarriage, divorce at the instance of the wife for a compensation less than or equal to the dowry, abandonment of his wife, admitting having fathered a child, or denying having fathered a child and exchanging oaths with the wife who claims his fatherhood.

On the other hand, most *Shāfiʿī*s ruled that financial dealings of the mentally incompetent are not valid, even if authorized by his guardian. They based this ruling on the view that his eligibility for such dealings is negated by interdiction, in analogy to the case of non-discerning children. Thus, if a person is interdicted based on mental incompetence, his trading and gifts are invalid. Thus, if he buys or borrows a property and it perishes in his possession, he is not required to compensate the seller or lender.

Moreover, they also ruled in analogy to the case of children that a mentally incompetent person’s admission of debts or other financial liabilities due to transgression, before or after his interdiction. In contrast, they ruled that his admission of physically-punishable crimes is valid, since this does not involve financial compensations and thus his incompetence in financial matters does not

<sup>47</sup> Al-Khaṭīb Al-Shirbīnī ((*Shāfiʿī*), vol.2, pp.168,170-3), ‘Abū-’Ishāq Al-Shīrāzī ((*Shāfiʿī*), vol.1, p.332).



pose any problems. In this regard, if he admits to having committed murder, he may be killed for it, but if the family of the murdered individual demand financial compensation instead, they may not get it from him, since liability for that money is established by their choice rather than his valid admission.

In matters of worship, the legal rulings for his obligatory and physical supererogatory acts of worship are all the same as those of competent adults, since he meets all the conditions for such acts. On the other hand, he does not share the same rulings with competent adults for financial supererogatory acts of worship (e.g. voluntary charity). Moreover, the mentally incompetent is not allowed to distribute his obligatory *zakāh* himself, since that is a financial dealing. However, if his guardian points out to whom he should give how much, and authorizes him to make the payment thus, it is deemed valid in analogy to the case of a discerning child. In the latter case, the spending of *zakāh* money should still be supervised by the guardian to ensure that the mentally incompetent individual does not squander the wealth or lie about having spent it appropriately.

Finally, they ruled that a mentally incompetent person is allowed to pledge an amount of wealth as a liability on him, but is not allowed to pledge any specific property. Moreover, they ruled while performing any obligatory pilgrimage (his principal *ḥajj*, a compensation for one that was corrupted, or to fulfill a pledge made prior to interdiction), the guardian must appoint a trustworthy pilgrim to make his expenditures (in agreement with the Ḥanafī ruling in this regard). In this regard, if an interdicted person begins a voluntary pilgrimage, or one that he pledged after interdiction, and then his expenses during pilgrimage travel exceed his normal expenses at home, his guardian may prevent him from completing the pilgrimage to protect his property. In this case, the interdicted person's pilgrimage is compared to that of one who was physically prevented from completing the pilgrimage, and thus he should end his state of ritual purity and compensate with fasting since he is not allowed to compensate financially. In contrast, if the interdicted pilgrim was able to make a profit on his trip that compensates for the difference between his expenditures at home and those during pilgrimage travel, then he should not be prevented from completing the pilgrimage. In the latter case, completion of the pilgrimage without wasting his property is possible, and thus the guardian has no right to interfere with his act of worship.

#### 97.4.4 Ḥanbalī rulings

The Ḥanbalīs defined<sup>48</sup> a mentally incompetent individual as one whose actions are not good or wise. Thus, they agree with other schools of jurisprudence that mentally incompetent persons must be interdicted by the ruler. To remove the interdiction based on mental incompetence, a court order is also necessary, since the initial interdiction is established with one, in analogy to the case of interdiction of a bankrupt debtor. In this regard, the Ḥanbalīs agree with the

<sup>48</sup>Ibn Qudāmah (, vol.4, pp.469-75), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.440-3).



Shāfiʿis that once the ruler interdicts a mentally incompetent person, it is highly recommended that the interdiction is witnessed and made known, so that others will avoid dealing with him. If anyone were to deal with an interdicted mentally incompetent person after the public announcement of his interdiction, he would thus be exposing his own property to ruin.

The Ḥanbalīs ruled that the order of guardianship of a mentally incompetent child when he reaches puberty is: his father, then the father's plenipotentiary, and then the ruler in their absence. On the other hand, if the interdiction is established or renewed after reaching puberty, only the ruler may manage his financial affairs, since the ruler's order is required for establishing and removing interdiction in this case.

They agreed with the Ḥanafīs that a mentally incompetent interdicted person's marriage is valid if he needs to marry, whether or not it is authorized by his guardian. This ruling follows from the view that marriage is a pure benefit to the interdicted. However, he is only allowed to pay the average dowry for similar marriages, since any increase thereof would be a voluntary financial contribution, from which he is not eligible. On the other hand, they ruled that if the mentally incompetent person did not need to marry, then his marriage is only valid if authorized by his guardian. The latter ruling is based on the fact that marriage requires a financial payment, and thus requires his guardian's authorization in analogy to trading.

In contrast, we have seen that all jurists agree that an interdicted mentally incompetent person's divorce is valid, since it does not involve a financial payment. Moreover, divorce at the instance of the wife, for which he receives a financial compensation (*khulʿ*), is valid since it is beneficial from a financial point of view.

Moreover, they ruled that abandoning his wives, and the exchange of oaths to support and negate an accusation of adultery or fathering children, are valid. An interdicted mentally incompetent person is also allowed to acknowledge fatherhood of a child. Jurists also agree that the will of such an individual is valid, since it is beneficial to him, and brings him closer to Allāh if he gives up to one-third of his estate to charity upon his death.

They also agreed with other jurists that his admission of guilt for physically-punishable crimes (e.g. adultery, theft, drinking wine, slander, murder, etc.) is valid. On the other hand, if he admits having committed murder, and the relatives of the victim absolve him of the physical penalty and demand financial compensation, the Ḥanbalīs agree with the Shāfiʿis that the financial compensation is not payable at that time, but becomes binding once interdiction is removed. This ruling was based on the fact that the interdicted may agree with the victim's family that he will admit guilt and they will absolve him of the physical penalty. But that would involve admitting responsibility for a financial compensation, for which the interdicted is not eligible.

The Ḥanbalīs ruled that all admissions of financial liability by the interdicted are invalid, including debts and liability for compensation due to usurping, stealing, or destroying property. In this regard, the rulings for mentally incompetent individuals requiring compensation for destroyed property are the same as those



for children and insane individuals.

If he admits to any such liability, the admission is not binding upon him as long as he is interdicted. However, the majority of Ḥanbalīs ruled that once his interdiction is removed, all admitted financial liabilities become binding upon him.

They also agreed with other jurists that pure voluntary contributions such as gifts and the establishing of mortmainss are not valid for the mentally incompetent. This ruling is based on the view that such actions are financially harmful, and thus the mentally incompetent is not eligible to engage in them, in order to protect his property.

Moreover, they ruled that the mentally incompetent is not allowed to enter into partnerships, debt transfers, or guaranties of others. Those rulings pertain to financial dealings, and thus may be inferred by analogy to trading. In this regard, the trading of a mentally incompetent individual is deemed invalid if it is not authorized by his guardian, to protect his property. On the other hand, there are two rulings regarding trading that is authorized by his guardian:

- The first ruling is that such authorized trading is valid. This ruling is based on the view that trading is a commutative contract, and thus is valid if authorized by the guardian, in analogy to the ruling for marriage. This is the majority opinion among the Ḥanbalīs.
- The second ruling is that the authorized trading is invalid. This ruling is based on the view that interdiction is established on the basis of the person's inability to make good financial decisions. Thus, the authorization to engage in potentially harmful dealings is invalid, and so is the trading. This is the majority opinion among the Shāfi'īs.

A mentally incompetent individual is liable for all legal responsibilities such as paying the expenses of his wife, servants, and other dependents. He is also responsible for all religious financial obligations such as zakāh. However, he is not allowed to distribute his zakāh, which should be distributed by his guardian who manages all of his financial dealings. Moreover, while he is allowed to pledge any physical acts of worship, he is not allowed to pledge financial acts of worship such as charity and slaughter of animals to give to the poor.

A mentally incompetent individual may go on the obligatory pilgrimage, and his travel and other expenses should be handled by a trustworthy co-pilgrim. On the other hand, they agreed with the Shāfi'īs regarding the invalidity of supererogatory pilgrimage if its expenses exceed his expenses at home, unless the excess costs are offset by profits that he can make on his trip.

Overall, the Ḥanbalīs ruled that the guardian of a mentally incompetent person must deal in his property to maximize his benefits. This ruling is analogous to the dealings of the guardian of a child or an insane individual.

In summary, the Ḥanafīs and Mālikīs render trading of a mentally incompetent individual to be suspended pending the approval of his guardian. In contrast, the Shāfi'īs deem his trading invalid even if authorized by the guardian, while the majority of Ḥanbalīs deem it valid and executed if authorized thus.



## 97.5 Stupid individuals

Stupid individuals are ones who can be fooled in trading, due to lack of experience and intelligence, and despite his purity of heart. In this regard, we can distinguish between a stupid person and one who is mentally incompetent. The stupid may destroy his property unintentionally, while a mentally incompetent person is one who destroys his property intentionally by following his whims. Moreover, a stupid person may be distinguished from an idiot by the fact that the speech of the latter is often incoherent, while that of the former is lucid (though unintelligent).

'Abū Ḥanīfa ruled that stupid individuals should not be interdicted in lieu of their stupidity. On the other hand, the majority of Ḥanafīs and jurists of the other schools agree with the opinion of 'Abū Yūsuf and Muḥammad that a stupid person should be interdicted to protect his interests. The latter majority ruling renders the status of all dealings of a stupid person identical to their counterparts for the mentally incompetent.<sup>49</sup>

### 97.5.1 Commencement and end of interdiction

Muḥammad 'ibn Al-Ḥassan, and 'Ibn Al-Qāsim Al-Mālikī ruled<sup>50</sup> that a mentally incompetent or a stupid person must be interdicted at the time signs of mental incompetence or stupidity are observed, and the interdiction must be removed once those respective signs disappear. Thus, they ruled that a court order is not necessary for the establishment or dissolution of interdiction, since the latter should start and end with its reason. Thus, all dealings of such individuals are deemed invalid and non-executable as soon as signs of mental incompetence or stupidity are observable, and they are thus considered interdicted even before a court order is issued to that effect.

In contrast, the majority of Ḥanafīs and jurists of other schools agreed with the opinion of 'Abū Yūsuf that a court order is necessary for establishing or removing interdiction of a person based on mental incompetence or stupidity.<sup>51</sup> This ruling is based on the view that mental incompetence and stupidity are not easily observable, in contrast to insanity and idiocy. Rather, they argued, the determination that a person is mentally incompetent or stupid is a matter of opinion, and thus requires a court order to preempt possible disputes of conflicting claims. Such a settlement of potential disputes is crucial to minimize uncertainty and potential loss to those who may deal with such individuals on the assumption of mental competence. Thus, a publicized court order is required to settle any future claims that a person is mentally incompetent or stupid.

The latter opinion seems to be more logical, and more conducive to minimizing uncertainty and deception. Thus, he favored the ruling that the dealings

<sup>49</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.102 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.198 onwards), Al-Kāsānī ((Ḥanafī), vol.7, p.169).

<sup>50</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.103,106), Al-Dardīr ((Mālikī)A, vol.3, p.297 onwards).

<sup>51</sup>'Ibn Juzayy ((Mālikī), p.321), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.103), Al-Dardīr ((Mālikī)A, vol.3, p.388), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.170), 'Ibn Qudāmah (, vol.4, p.469).



(e.g. trading) of a mentally incompetent or stupid person that are concluded prior to interdiction by court-order are deemed executed.

## 97.6 Muslim sinners

The Ḥanafīs, Mālikīs, Ḥanbalīs, and most of the Shāfiʿīs agreed that a Muslim who does not act according to the rulings of Islam (*a fāsiq*) cannot be interdicted purely on the basis of being a sinner. Thus, if the person is a sinner but does not spend his property inappropriately, he is deemed eligible to handle his financial affairs and those of his family, and may not be interdicted.<sup>52</sup> They based this ruling on the view that interdiction was legalized to prevent inappropriate use of property. They also argued that there is no incident in the early days of Islam that sinners were interdicted merely by virtue of being sinners. In this regard, a person may not be interdicted for deviating from Islamic teachings, regardless of whether he started sinning prior to reaching puberty or afterwards.

### Note on absent individuals

The Ḥanafīs ruled that it is permissible to interdict an absent person, provided that he is informed of the interdiction. This is in contrast to their general rule that legal judgments may not be issued against absent persons.<sup>53</sup>

## 97.7 Public interest

The Ḥanafīs ruled<sup>54</sup> that it is permissible to interdict a person to protect public interests. This ruling is based on the general rule that an individual interest may be compromised to protect a social interest, and a smaller harm may be tolerated to avoid a larger one. Thus, it is permissible to interdict (i.e. limit the activities of) an ignorant physician, a devious jurist who teaches people illegal means of circumventing Islamic Law, and bankrupt individuals who lease properties that they do not have (and cannot obtain due to their bankruptcy).

Interdicting such individuals and others whose actions pause a public nuisance is required to protect public interests, even if the interdiction implies limiting their freedom and usurping their rights. Indeed, interdiction in such cases is a commensurate punishment for their actions, and a means of protecting people thereof. 'Abū Ḥanīfa is narrated to have restricted interdiction to those three categories of people, arguing that the ignorant physician harms people's bodies, the devious jurist harms people's religion, and the bankrupt lessor harms people's property.

<sup>52</sup>'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.102), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.75), 'Ibn Juzayy ((Mālikī), p.320), Al-Dardīr ((Mālikī)A, vol.3, p.292), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.170), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.440).

<sup>53</sup>'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.106).

<sup>54</sup>Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.193), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.102 onwards), Al-Kāsānī ((Ḥanafī), vol.7, p.169), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.316), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.68).



However, we must note that interdiction of such individuals is not the same type of interdiction discussed earlier. The term is used metaphorically in this case to refer to a Legal prohibition of the execution of their actions. Thus, if a devious jurist issued a legal opinion after being interdicted, the opinion would be permissible if it is Legally accurate. Similarly, the doctor's sale of medication is executed after his interdiction. Thus, those types of individuals are interdicted in the sense of being prevented from pursuing the physical activities that are harmful for the bodies, religion, and properties of others.

## 97.8 The terminally ill

A terminal illness is one that often leads to death, even if it does not necessarily lead to death in most cases.<sup>55</sup> The definition of a terminal illness in *Majallat Al-'Aḥkām Al-ʿAdliyyah* (item # 1595) is thus: “an illness that prevents the sick man or woman from conducting their usual activities, neither increases nor decreases, and is followed by death within the year. If the illness was increasing, it is considered a terminal illness from the time it got more severe, even if its duration exceeded a year”. In this regard, if a person gets sick and then recovers, he is not subject to the rulings for terminal illness. Moreover, if the person is subject to a severe illness, but one that does not restrict him to bed, then he is not considered terminally ill.

Thus, the Mālikīs classified sick individuals into two categories:<sup>56</sup>

- Individuals who suffer from a disease that rarely leads to death (e.g. leprosy, conjunctivitis, etc.) are not considered terminally ill, and thus they are not interdicted.
- Individuals who suffer from an illness that usually leads to death (e.g. the plague, tuberculosis, etc.) are considered terminally ill. However, the determination of whether or not an illness is fatal must be assessed on the basis of medical science of each age. For instance, he argued, tuberculosis is not as fatal in our era as it was in the past.

Jurists of all schools agreed that a terminally ill individual may be interdicted to protect the rights of his heirs.<sup>57</sup> The Mālikīs further ruled that the same applies to individuals who are feared to die shortly, such as soldiers on the front lines, individuals who are waiting on death-row, and women in advanced pregnancy beyond the six months. The Mālikīs varied in their rulings regarding sea-travelers during severe storms, with most jurists ruling that they are not subject to the rulings of the terminally ill.

<sup>55</sup> Al-Dardīr ((Mālikī)A, vol.3, p.306).

<sup>56</sup> Ibn Juzayy ((Mālikī), p.322).

<sup>57</sup> Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.480 onwards), *Sharḥ Al-Sirājiyyah* (p.5), Al-Dardīr ((Mālikī)A, vol.3, p.306 onwards), Al-Dardīr ((Mālikī)B, vol.3, p.399-402), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.165), Ibn Juzayy ((Mālikī), p.322 onwards), Ibn Qudāmah (, vol.4, p.465), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.404).



A terminally ill individual is only interdicted in the sense of being prevented from giving more than one-third of his estate after deducting debts as uncompensated contributions.

Thus, a terminally ill person is not allowed to give gifts, charity, inheritance, mortmain, selling at excessively low prices, or buying at excessively high prices, for more than one third of his estate after subtracting debts. Thus, the dealings of a terminally ill person are executed for one third of his estate, and suspended pending the permission of the would-be-heirs for the rest, in analogy to the ruling for wills. However, if the person thought to be terminally ill recovers from the illness, the Ḥanafīs, Shāfiʿīs, and Ḥanbalīs ruled that all of his dealings would thus be executed. On the other hand, if terminally ill had debts that exceeded the full value of his estate, then he would be fully interdicted (with no regard to the one-third rule) to protect the rights of his creditors.

In contrast, the Mālikīs ruled that the dealings of a terminally ill individual are executed up to one-third of his estate only if the property thus dealt with is unchanging (e.g. real estate, land, or trees). On the other hand, if the contributed property was variable in form and value, they ruled that the dealings of the terminally ill thereof are deemed suspended until the person dies or recovers, even if they are within one third of his estate. Then, if he dies, his dealings are executed up to one-third of his estate, and if he recovers from the illness, all of his dealings are executed.

The Mālikīs further ruled that a terminally ill person is prevented from spending excessively on food, drinks, clothing and medicine, and prevented to marry if the dowry exceeds one third of his estate. However, they ruled that a terminally ill person is not prevented from commutative financial contracts, such as trading, borrowing and lending, leasing, and engaging in silent partnerships and crop-sharing. They based the latter ruling on the view that such commutative dealings do not contain a purely contributory component, and thus do not affect the rights of the heirs adversely.

In this regard, the Ḥanafīs ruled that all the necessary personal and family dealings of a terminally ill person are executed without need for any permission. This includes expenses on food, clothing, lodging, medical expenses, etc. Moreover, they ruled that a terminally ill person is allowed to marry, since marriage can provide him with comfort and company, provided that he does not pay an excessively high dowry. If he does marry with a dowry that exceeds the social average for similar brides, the increase is considered a voluntary contribution, and subjected to the rules of wills.

Finally, a terminally ill person is allowed to acknowledge a debt to one of his heirs, or to a third party. If he acknowledged a debt to a non-inheritor, the acknowledgement is valid and executed without any need to get the permission of his heirs. However, debts that he acknowledged in a state of good health are given precedence in repayment over debts acknowledged while terminally ill.



## 97.9 Married women

One of two recorded opinions of 'Aḥmad agrees with the Mālikī ruling<sup>58</sup> that a free and discerning married woman is prevented from engaging in uncompensated dealings (e.g. gifts and guaranty) for more than one-third of her wealth, to protect the interests of her husband. This ruling was derived in analogy to the rulings for terminally ill individuals. However, most of the Mālikīs ruled that her uncompensated contributions beyond one-third of her wealth is considered executed until the husband demands its return. In this regard, if the wife gave more than one-third of her wealth in an uncompensated contribution, the husband is permitted to do one of three things: (i) void the full contribution, (ii) allow the full contribution, or (iii) allow the portion up to one-third of her wealth and return the rest. If the husband returns any part of the wife's contribution, the majority view it as a return by virtue of that part having been suspended, while 'Ashhab ruled that this return is by virtue of the invalidation of that contribution or portion thereof. In this regard, the majority of Mālikīs ruled that the decision as to whether or not the wife contributed more than one-third of her wealth is determined based on the sum total of all her uncompensated contributions within a six-month period.

Moreover, the majority of Mālikīs ruled that all of her uncompensated contributions are executed if the husband only learns of her actions after they are divorced, if he learns of them and does not object, or if either the woman or her husband dies.

However, a wife is not prevented from spending her wealth on her parents. In this regard, Mālik ruled that the husband may recall any expenditures on her parents beyond one-third of her wealth, if her intent in this expenditure was to hurt him. In contrast, 'Ibn Al-Qāsim ruled that the one-third rule does not apply to spending on her parents, even if her intent was to harm him.

On the other hand, the Mālikīs allowed a wife to give all of her wealth, or any portion thereof, as a gift to her husband. They ruled that no party has a right to object to such a donation to her husband.

All of the above pertains to uncompensated contributions of the wife. However, the Mālikīs ruled that the wife is permitted to deal unconditionally with her property in commutative contracts (e.g. trading). The Mālikī rulings regarding uncompensated contributions is based on narrations including the Ḥadīth: "A woman is not allowed to give her property in charity without her husband's permission, since his marriage rights are inviolable".<sup>59</sup>

In contrast, the Ḥanafīs, Shāfi'īs, and the majority of Ḥanbalīs ruled that a discerning woman is allowed to deal in her property with or without compen-

<sup>58</sup>Al-Dardīr ((Mālikī)A, vol.3, p.307 onwards), Al-Dardīr ((Mālikī)B, vol.3, p.402), 'Ibn Juzayy ((Mālikī), p.323), 'Ibn Qudāmah (, vol.4, p.464), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.405).

<sup>59</sup>Narrated by the five major narrators of Ḥadīth with the exception of Al-Tirmidhī on the authority of 'Amr ibn Shu'ayb, his father, and his grandfather, that the Prophet (pbuh) said in a sermon: "A woman is not allowed to deal in her property if her husband is given inviolable marriage rights". There are other narrations of this Ḥadīth in 'Ibn Mājah, c.f. 'Ibn Qudāmah (, ibid.), Al-Shawkānī (, vol.6, p.18).



sation.<sup>60</sup> They based this ruling on the verse: “If then you find them of sound judgment, release their properties to them” [4:6], which implies that discerning women are not interdicted in any way. Moreover, there is an established Ḥadīth wherein the Prophet (pbuh) said: “O women, give charity, even by giving away your jewelry ...”, and then he (pbuh) accepted their charities without asking them for any details.<sup>61</sup> This opinion of the majority of jurists seems to be the more reasonable, since Islam recognizes the woman’s juristic personality to be separate from her husband’s. Indeed, he argued, all Muslims are proud of the fact that Islamic Law gave women full eligibility to own property and to deal in it.

### 97.9.1 Digression on charitable contributions

There are two reported opinions of ‘Imām ‘Aḥmad regarding the eligibility for a woman to give a small amount of her husband’s property in charity without his permission. Those two opinions encompass all the rulings given in the classical books of jurisprudence.<sup>62</sup>

- The majority of Ḥanbalīs agree that a woman is allowed thus to give a small part of her husband’s wealth in charity. This seems to be the appropriate opinion. This ruling is based on the Ḥadīth narrated by ‘A’ishā (mAbpwh) that the Prophet (pbuh) said: “If a woman spends from her husband’s household, she gets the reward for that spending, as long as she does not spend inappropriately. Moreover, the husband gets an equal reward, and the treasurer gets an equal reward. Thus, the reward that each of them gets does not diminish the reward that the other gets”.<sup>63</sup> In this regard, ‘A’ishā (mAbpwh) did not mention in this Ḥadīth that the husband’s permission is required. Indeed, this is natural, since it is expected that a husband implicitly gives his wife the permission to make such charitable contributions.

However, if the husband explicitly forbade his wife from giving in charity, or if she suspected that he would object to her spending due to his miserliness, then she is not allowed to give any of his property in charity.

The same rulings apply to others who may take care of the man’s wealth in a manner similar to his wife (e.g. his sister or servant who handles his household spending). Such individuals may also give small amounts of the man’s wealth in charity, but only if it is customarily and implicitly understood that he approves such spending.

<sup>60</sup> ‘Ibn Qudāmah (, vol.4, p.464).

<sup>61</sup> Narrated by Al-Tirmidhī on the authority of Zaynab the wife of ‘Abdullāh ibn Mas‘ūd, c.f. Ḥadīth # 635 of Al-Tirmidhī’s *Sunan*.

<sup>62</sup> ‘Ibn Qudāmah (, vol.4, p.465 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.448 onwards), Al-Shawkānī (, vol.6, p.16).

<sup>63</sup> Narrated by the major narrators of Ḥadīth. There are a number of other Ḥadīths to the same effect, c.f. Al-Shawkānī (, vol.6, p.15 onwards).



On the other hand, a husband is not allowed to give his wife's food in charity, since that is not customary.

- The other ruling is the impermissibility of spending any amount of the husband's property in charity without his permission. This ruling is based on the narration by 'Abū 'Umāmah Al-Bāhiliy that he heard the Prophet (pbuh) say: "A woman is not allowed to spend anything out of her household without her husband's permission. He (pbuh) was asked: Not even food, O Messenger of Allāh. He replied: That is the best of our wealth".<sup>64</sup> Moreover, those who ruled thus based their ruling on the view that the wife would thus be giving the husband's property away without his consent, which is not permissible for anyone.

The Ḥanbalī jurist 'Ibn Qudāmah ruled that the first opinion is more correct. He based his selection on the fact that the Ḥadīths upon which the first ruling was based were valid and specific (*khāṣṣah*). In this regard, specific narrations are always given precedence over general ones, and understood as explanations of the meaning of the general narration within the specific context. Moreover, he argued, the Ḥadīth of Al-Bāhiliy has a weak chain of narration. Finally, he argued that it is not appropriate to determine whether or not a wife is allowed to spend her husband's property by analogy to third parties, since a wife customarily deals in her husband's property and gives some of it in charity. In this regard, he argued that the implicit permission of the husband is equivalent to an explicit permission to spend.

## 97.10 The bankrupt

### 97.10.1 Definition of bankruptcy

Bankruptcy literally refers to the declaration that an individual has very little wealth left. Legally, the term refers to a court-order that forbids the declared bankrupt individual from dealing in his property, and thus enabling his creditors to protect their rights thereof.

Conventionally, a person is called bankrupt if he has no property. Legally, the term is often applied if the volume of a person's matured debts exceeds the value of his property. In this regard, a person may be legally bankrupt despite having some properties, since whatever he owns is claimed by one or more of his creditors. Thus, were he to repay as much as he can of his debts, he would in fact be penniless. Such bankrupt persons are often forbidden from all but the very basic transactions required to sustain his living. Thus, the permissible dealings and the net worth of a bankrupt individual can be measured in the smallest of denominations (*fulūs* or copper pennies), thus the Arabic term for a bankrupt individual (*muflis*) is derived from the term for copper pennies.<sup>65</sup>

<sup>64</sup>Narrated by Sa'īd ibn Manṣūr in his *Sunan*. There are many other Ḥadīths that have a similar meaning, forbidding any individual from spending the property of another without his consent.

<sup>65</sup>'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.280), 'Ibn Juzayy ((Mālikī), p.318), Al-Dardīr



### 97.10.2 Interdiction of the bankrupt

'Abū Ḥanīfa ruled<sup>66</sup> that a bankrupt individual is not interdicted by virtue of his debt. He based this ruling on the view that money comes and goes, but interdiction of an eligible discerning individual degrades his humanity and freedom. Thus, he ruled that both the bankrupt and idiots cannot be interdicted, since he viewed the loss of dignity resulting from interdiction to be more harmful than the potential loss to creditors.

Hence, he ruled that the dealings of a bankrupt individual are executed, and his property is not sold without his consent. Instead, the bankrupt debtor should be ordered to repay his debts, and he should be incarcerated if he refuses to repay them. In this regard, incarceration is an appropriate penalty for his transgression by refusing to repay the portion of his debts that he can repay if he sells his property.

Thus, 'Abū Ḥanīfa ruled that the court cannot sell the property of a bankrupt individual, but can only order his incarceration until he repays his debts voluntarily or dies in jail.

The majority of Ḥanafīs ruled in accordance with the opinions of 'Abū Yūsuf, Muḥammad, and the majority of jurists, that a bankrupt debtor may be interdicted in financial matters, to protect the rights of his creditors. They based this ruling on the Ḥadīth narrated by Al-Dāraqūṭnī and Al-Khallāl, and rendered valid by Al-Ḥākim, that the Prophet (pbuh) interdicted Mu'adh (mAbpwh) and sold his property to repay his debt, thus repaying five-sevenths of the total debts he owed. The Prophet (pbuh) then told the creditors that that is all they can get in lieu of Mu'adh's debts. The different schools of jurisprudence agreed on this general ruling, but differed on some of the details regarding the need for a court order to establish interdiction, and other similar questions.

### 97.10.3 The need for a court order

#### Mālikī rulings

The Mālikīs classified<sup>67</sup> bankrupt debtors into three categories:

1. Before the bankrupt person's property is taken from him to repay the creditors, the latter are allowed to forbid him from engaging in uncompensated dealings with his property, regardless of the maturity dates of the debts he owes them. Thus, they may preempt any of his dealings that may harm their interests in the future, and void any gifts, charities, guaranties, or loans on his part. Moreover, they may forbid him from acknowledging suspicious debts to his child or his wife, but they cannot forbid him from acknowledging other debts if there is no suspicion that

((Mālikī)A, vol.3, p.261), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.146), 'Ibn Qudāmah (, vol.4, p.408), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.405).

<sup>66</sup>'Ibn Al-Humām ((Ḥanafī), vol.7, p.324 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.199), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.72).

<sup>67</sup>Al-Dardīr ((Mālikī)A, vol.3, pp.261-4), Al-Dardīr ((Mālikī)B, vol.3, pp.345-53), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.280 onwards), 'Ibn Juzayy ((Mālikī), p.318 onwards).



he is evading repayment. Moreover, they are not allowed at that stage to forbid him from engaging in commutative transactions such as trading, etc., which are thus executed.

2. The creditors may try to approach the bankrupt debtor without resorting to courts. In this case, if he evades them, they may shield his property from his dealings, thus forbidding him from all dealings, including gifts, trading, and even marriage. In this case, they may divide his property in proportion to the debts that he owes each of them.<sup>68</sup>
3. If a judge ruled that the debtor is bankrupt, he may confiscate his property and divide it among his creditors.<sup>69</sup> This type of court order may only be issued upon the request of some or all of the creditors, whose debts must be matured at the time of the court order, and must exceed the value of his property. Thus, it is not permissible to declare someone's legal bankruptcy by virtue of deferred debts. If the court order is issued upon the request of some of the creditors, all creditors would still share in the distribution of his property.

The legal declaration of bankruptcy in this third case has four consequences that are tantamount to interdiction: he is thus forbidden from (i) making uncompensated contributions, (ii) engaging in commutative financial contracts, (iii) and marrying more than one woman; and (iv) his deferred debts become matured and his property is divided among his creditors. Thus, he is interdicted from all compensated and uncompensated dealings. Moreover, his creditors may forbid him from traveling for trade or other reasons if his debts are matured or about to mature while he is away if he travels. They may also ask the judge to incarcerate him, and the judge may incarcerate him to ensure that he cannot violate the interdiction court order.

### Non-Mālikī rulings

The non-Mālikīs ruled<sup>70</sup> that a debtor may only be interdicted by a court order. Thus, prior to a court declaration of bankruptcy, all of his dealings would be executed. Then, if he is interdicted by the judge, he is thus prevented from engaging in any compensated or uncompensated financial dealings, or any acknowledgements of debt that may affect his creditors adversely. Thus, the judge may confiscate and sell his property, and distribute the proceeds to the creditors.

The accepted opinion among the Ḥanafīs, which was first expressed by 'Abū Yūsuf and Muḥammad, is that two conditions must be satisfied to interdict a

<sup>68</sup>This is called bankruptcy in the general sense.

<sup>69</sup>This is called bankruptcy in the specific sense.

<sup>70</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.199), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.103), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.73), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.327 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.147-9), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.320), 'Ibn Qudāmah (, vol.4, pp.409,471), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.407-11).



debtor: (i) his debt must equal or exceed the value of his properties, and (ii) his creditors must request his interdiction. The Shāfi'is and Ḥanbalis also agreed with the necessity of those two conditions for interdiction of bankrupt debtors.

It is permissible for a bankrupt man to marry, provided that he pays the average customary dowry for the likes of his prospective wife. He is also allowed to divorce his wife, accept divorce at her instance and financial compensation thereof, or remarry her. He is allowed to exact physical retribution for the murder of a family member of his, or to absolve a killer of such retribution, even without demanding a financial compensation. He is also permitted to return merchandise that he bought prior to interdiction due to defect or revocation, if returning the merchandise is beneficial.

The majority of Shāfi'is also ruled that interdiction rulings extend to properties acquired after interdiction as a gift, inheritance, credit purchase, and hunting. They based this ruling on the view that the purpose of interdiction is to protect the rights of the creditors and repay as much of the debts owed to them as possible. Thus, interdiction applies to all of the debtor's properties, and not only those that he possessed at the time of interdiction.

On the other hand, the personal and family needs of the bankrupt debtor have priority over the rights of his creditors. Thus, he is allowed to spend on his own needs, and those of his family and dependents, while interdicted.

The Ḥanafis distinguished between the two types of interdiction legalized for bankrupt debtors on the one hand, and mentally incompetent individuals on the other:<sup>71</sup>

1. The mentally incompetent are interdicted due to personal characteristics that make him unable to make sound decisions. In contrast, the interdiction of bankrupt debtors is intended to protect the rights of his creditors. Both types of interdiction require a court order in the Ḥanafī school.
2. The acknowledgements of debt by an interdicted bankrupt debtor are executed after his interdiction is removed, even if it pertains to properties that he acquired after the acknowledgement. In contrast, an interdicted mentally incompetent person is not allowed to acknowledge debts before or after his interdiction, and for properties that he had already owned or those that he acquired later.

The Shāfi'is, Ḥanbalis, and Mālikis also agree on those two distinguishing features of the different types of interdiction.

Jurists also argued that the interdiction of bankrupt debtors is stronger than the interdiction due to terminal illness. As proof, they noted that an ill person is permitted to deal in one-third of his estate prior to dying, and the rights of his heirs get associated to the state only upon his death. In contrast, the rights of creditors are associated with the property of the interdicted bankrupt debtor in a manner analogous to pawning.<sup>72</sup>

<sup>71</sup> 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.103), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.196).

<sup>72</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.148), 'Ibn Qudāmah (, vol.1, p.321).



### 97.10.4 Travel of a bankrupt debtor

Jurists differed slightly in their opinions regarding the prevention of bankrupt debtors from traveling:

- The Ḥanafīs and Shāfiʿīs ruled<sup>73</sup> that creditors are not allowed to prevent the debtor from traveling before their debts are matured, regardless of the maturity date. This ruling follows from the fact that the creditors may only demand repayment on that maturity date, and not before. On the other hand, once their debts are matured, they have the right to prevent the debtor from traveling until he repays those matured debts.
- The Mālikīs ruled<sup>74</sup> that a creditor is allowed to prevent a debtor from traveling, for trade or other purposes, if the debt is matured or if it is expected to mature during his absence. They stipulated this ruling regardless of whether the debt is less, equal, or greater than the value of the debtor's property. On the other hand, they allow the debtor to appoint an agent to repay his debt during his absence, or to find a wealthy guarantor to guarantee his debt, in which case the creditor is not allowed to prevent him from traveling. Moreover, they did not allow the creditor to prevent him from traveling if the maturity date of the debt is after the debtor is expected to return from his travel.
- The Ḥanbalīs agreed with the Mālikīs in this regard.<sup>75</sup> Thus, they said that if the debtor is expected to return from his travels after the debt matures, then the creditor is allowed to prevent him from traveling a distance that would allow him to shorten his obligatory prayers. They also agreed with the Mālikīs that he is not allowed to prevent the debtor from traveling if the latter is expected to return prior to the debt's maturity date. However, if the debtor is traveling to fight with the army, then the creditor is allowed to prevent him unless the debt is guaranteed with a pawning or guarantor. In the latter case, it is likely that the debtor dies in his trip, and thus the creditor needs a means of guaranteeing his right.

Thus, we see that the Mālikī and Ḥanbalī opinion is stricter and more aggressive in protecting the rights of creditors. Thus, in contrast to the Ḥanafīs and Shāfiʿīs, they allow the creditor to prevent the debtor from traveling if the debt is about to mature during the debtor's absence, unless the debtor can provide guarantee through pawning of third-party guaranty.

### 97.10.5 Consequences of interdiction

There are a number of consequences of the legal interdiction of bankrupt debtors. In what follows, we shall discuss them in some detail.

<sup>73</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.137), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.329), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.74), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.319), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.157).

<sup>74</sup>Al-Dardīr ((Mālikī)A, vol.3, p.262), Al-Dardīr ((Mālikī)B, vol.3, p.348).

<sup>75</sup>'Ibn Qudāmah (, vol.4, p.455), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.405 onwards).



### 1. Creditor rights

When a bankrupt debtor is interdicted, the rights of the creditors are attached to his property, and he is thus forbidden from dealing in that property.<sup>76</sup> In this regard, it is highly recommended that the declaration of legal bankruptcy and interdiction be witnessed by a judge, so that everyone will know of his state of bankruptcy, and thus would only deal with him with full knowledge of his financial situation.<sup>77</sup> Then, once interdiction is established, the rights of creditors are attached to his property in a manner analogous to the pawning of that property. Thus, jurists agree that all dealings of his that would harm the interests of the creditors (e.g. uncompensated contributions such as gifts and charity, or acknowledgement of debt) are not invalidated.

However, the Mālikīs ruled that the interdicted bankrupt debtor is allowed to acknowledge debts to a non-family member, if there is no suspicion of foul-play. In contrast, acknowledgement of debts to family members is not accepted after interdiction, since there is then suspicion of trying to cheat his creditors. Moreover, they ruled that acknowledgements of debts after interdiction must take place at or near the location of interdiction.

The Ḥanbalīs, and most of the Shāfi'īs, ruled that all trading and other commutative financial dealings of interdicted bankrupt debtors are deemed invalid. This ruling is based on the fact that the rights of creditors are attached to the property, and that the debtor is interdicted by a court order. Thus, they reasoned that trading or dealing in his property would be contrary to the interdiction court-order. In contrast, the Ḥanafīs ruled that an interdicted bankrupt debtor's trading is valid if he trades at or near market prices. However, if he trades away from market prices, the Ḥanafīs ruled that his trading is suspended pending the approval of his creditors. Finally, the Mālikīs ruled generally that commutative financial dealings of interdicted bankrupt debtors are not invalidated, but deemed suspended pending the approval of the judge and/or the creditors.

Moreover, dealings of the interdicted bankrupt debtor that pertain to his juristic liability, e.g. engaging in *salam* or selling an item established as a liability on him, are deemed valid since such dealings do not harm the interests of the creditors. Moreover, all of his non-financial dealings are deemed valid, including marriage, divorce, exacting or dropping the right for physical retribution for murder with or without financial compensation.

Finally, the bankrupt debtor's acknowledgement of liabilities that were established prior to interdiction are deemed valid. In contrast, all acknowledgement of liabilities attached to his property after interdiction are deemed invalid,

<sup>76</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.105), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.328), Al-Dardīr ((Mālikī)A, vol.3, p.265), Al-Dardīr ((Mālikī)B, vol.3, pp.352,355), 'Ibn Juzayy ((Mālikī), p.318 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.147), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.321), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.411), 'Ibn Qudāmah (, vol.4, pp.409,471).

<sup>77</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.321), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.148), 'Ibn Qudāmah (, vol.4, p.440), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.411).



regardless of the source of such rights.<sup>78</sup>

## 2. Maturity of deferred debts

The Ḥanafīs and most of the Mālikīs ruled that once interdiction is established for a bankrupt debtor, all of his deferred debts are matured at the date of interdiction, in analogy to the maturity of debts upon the debtor's death.<sup>79</sup> The instigating factor for ruling by analogy in the cases of bankruptcy and death of the debtor is the fact that his juristic personality ceases to be eligible for debts in both cases. The Mālikīs qualify their ruling in this case by excluding the case where the debtor stipulated a condition that his deferred debts do not become matured upon death or bankruptcy, and the case where the creditor kills the debtor on purpose.

The majority of Shāfi'īs, and the majority of Ḥanbalīs ruled<sup>80</sup> that deferred debts are not matured upon the declaration of the debtor's bankruptcy. They based this ruling on the view that deferment is a legal right of the debtor, which is not dropped by bankruptcy, like his other debts. In this regard, they distinguished between the bankruptcy of a debtor and the case of his death by virtue of the fact that death obliterates the juristic personality of the deceased. Consequently, they ruled that upon bankruptcy, deferred debts remain deferred, and the property of the bankrupt is used to pay as much as possible of the already matured debts. On the other hand, if the creditors with matured debts choose not to divide the debtor's property until other debts become matured, then all creditors with matured debts at the later date should share in the repayment. The latter ruling includes such debts as those established after interdiction by transgressing against the property of another.

## 3. Precautionary incarceration and monitoring

Jurists differed in their rulings regarding the constant monitoring and accompaniment of a bankrupt debtor. On the other hand, they agreed on the permissibility of incarceration by court-order, but only under certain conditions. We first deal with the issue of constant monitoring of the debtor:

- 'Abū Ḥanifa, 'Abū Yūsuf, and Muḥammad ruled that the creditors may monitor and constantly accompany the debtor. Thus, they may go with him wherever he goes. If he goes to his house, they may join him there if he allows them, otherwise they may wait at his door and continue to accompany him once he leaves. On the other hand, they ruled that the creditors are not allowed to prevent him from financial dealings, earning a living, and traveling while they accompany him. Thus, they are not allowed to incarcerate him or restrict his movement otherwise, but are only allowed to go with him wherever he goes. They ruled thus to give

<sup>78</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.148 onwards).

<sup>79</sup> Al-Dardīr ((Mālikī)A, vol.3, p.352), 'Ibn Juzayy ((Mālikī), p.318), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.282), Al-Dardīr ((Mālikī)A, vol.3, p.265 onwards).

<sup>80</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.147), 'Ibn Qudāmah (, vol.4, p.435).



creditors some leverage in demanding repayment of the debts owed to them. They provided proof for that ruling based on the Ḥadīth: “The possessor of a right can demand his right physically and verbally”, thus designating monitoring and accompaniment as a form of physical demand of repayment.<sup>81</sup> However, they did not allow accompaniment of a debtor woman, to avoid the possibility of allowing a man other than her husband or family member to be alone with her.

- Zufar, the Mālikīs, the Shāfiʿīs, and the Ḥanbalīs ruled<sup>82</sup> that nobody has the right to demand repayment or accompany the debtor if he can prove in court that he is unable to pay. In this case, the debtor must be given leeway until his financial situation improves, as per the verse: “If the debtor is in difficulty, grant him time till it is easy for him to repay” [2:280]. In this regard, they questioned the authenticity of the Ḥadīth upon which ‘Abū Ḥanīfa and his companions relied, and its relevance. Its authenticity was questioned by ‘Ibn Al-Mundhir, and its relevance may be limited to the cases of debtors who are capable of repaying their debts. Indeed, that limitation of the scope of applicability of the Ḥadīth is justified based on the other Ḥadīth wherein the Prophet (pbuh) told the creditors of a man whose debts grew once some fruits that he bought perished: “Take what you find, and you have no rights beyond that”.<sup>83</sup> This latter opinion seems to be the more appropriate one.

We now move to the issue of incarcerating a bankrupt debtor. It is a well known Islamic ruling that a debtor who is capable to repay his matured debts must do so, while a debtor who is incapable to repay must be given a grace period until he can. Thus, if the debtor has property with which he can repay matured debts, but he refuses to repay them, then the ruler may incarcerate him to force him to repay. This latter ruling is based on the Ḥadīth: “A lingering debtor who refuses to pay despite his ability is a transgressor, and thus it is permissible to complain about his transgression, and to punish him” [by incarceration].<sup>84</sup> However, the jurists of the different schools stipulated various conditions for the permissibility of incarcerating a debtor who lingers despite his ability to repay his matured debts:

<sup>81</sup>Narrated by ‘Ibn ‘Udayy in *Al-Kāmil* on the authority of ‘Abū ‘Utbah Al-Khawlanī. It was also narrated by Al-Dāraqūṭnī on the authority of Makḥūl with an incomplete chain of narrators. In a similar Ḥadīth, Al-Bukhārī narrated on the authority of ‘Abū Hurayrah that a man came to demand repayment of a debt that the Prophet (pbuh) owed him, and spoke to the Prophet (pbuh) in a rough manner. When the companions were about to accost the man, the Prophet (pbuh) said: “Let him be, for the possessor of a legal right has verbal license”, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.166).

<sup>82</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.156), ‘Ibn Qudāmah (, vol.4, p.449 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.406,430), Al-Dardīr ((Mālikī)B, vol.3, p.370), ‘Ibn Juzayy ((Mālikī), p.317), ‘Ibn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, p.280 onwards).

<sup>83</sup>Narrated by Muslim and Al-Tirmidhī.

<sup>84</sup>Narrated by the five major narrators of Ḥadīth with the exception of Al-Tirmidhī. It was also narrated by Al-Bayhaqī and ‘Ibn Ḥibbān, and deemed valid, on the authority of ‘Amr ibn Al-Ṣharīd and his father, c.f. Al-Shawkānī (, vol.5, p.240).



- Thus, the Ḥanafis ruled<sup>85</sup> that a judge is allowed to incarcerate the debtor, man or woman, if he knows or suspects that he or she is capable of repaying a debt established by a contract (e.g. marriage or guaranty), provided that he has no proof to the contrary. If the judge was unsure about the debtor's financial situation, and incarcerated him or her for two or three months, but could find no property during that period, he must thus release him or her. Moreover, if the debtor can establish inability to repay, the judge must release him or her, as per the verse [2:280]. Moreover, the debtor cannot be physically or emotionally harmed during incarceration, should not be chained, should not be undressed or embarrassed in public, and his labor services may not be leased.

They further stipulated three conditions for incarcerations, pertaining respectively to the debt, the debtor, and the creditor:

1. The debt must be matured. Thus, it is not permissible to incarcerate a debtor by virtue of a deferred debt. This ruling follows from the fact that incarceration is meant to provide a disincentive for harming the interests of the creditor by deferring repayment. However, if the debt is deferred, there is no legal foundation to providing such a disincentive.
2. The debtor must satisfy three conditions to be incarcerated:
  - (a) Ability to repay the debt. Thus, if he is incapable of repayment, he must be given a grace period, and cannot be incarcerated thus, as per the verse [2:280].
  - (b) He must be lingering and refusing to pay a matured debt, to establish his transgression as per the Ḥadīth: "A rich person who lingers in repayment of a matured debt is a transgressor".<sup>86</sup> Thus, incarceration may be legalized to prevent that injustice, and punish the transgressor. Thus, if it is not apparent that the rich debtor is evading repayment, he may not be incarcerated.
  - (c) The debtor cannot be a parent of the creditor. Thus, a debtor may not be incarcerated if he is refusing to repay a debt to his or her child, by virtue of the verses "Yet bear them company in this life with justice and consideration" [31:15], and "And that you be kind to your parents" [17:23]. In this regard, incarcerating a parent in lieu of a debt is neither kind nor considerate. However, if a father refuses to support a child that he is legally bound to support, the judge may incarcerate him to punish him thus. Moreover, if the plenipotentiary of a child-creditor is the reason the child's debt is not being repaid in time, he may be incarcerated thus.

<sup>85</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.173), 'Tbn Al-Humām ((Ḥanafī), vol.7, pp.329-30), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.199).

<sup>86</sup>Narrated by the major narrators of Ḥadīth on the authority of 'Abū Hurayrah, c.f. Al-Shawkānī (, vol.5, p.346).



3. The creditor must ask the judge to incarcerate the lingering debtor. Thus, the judge is not allowed to incarcerate the debtor without such a request coming from the creditor, since incarceration is a means of satisfying the latter's rights and thus may only be initiated by his expressed will.

The Ḥanafīs ruled that once incarcerated, the debtor is forbidden from leaving the place of incarceration for worldly, religious, or social affairs. Thus, he is not allowed to attend meetings, religious festivities, or funerals, to visit others who are sick or well, etc. The purpose of preventing the debtor from engaging in any of those affairs is to give him an incentive to repay the matured debt. On the other hand, they ruled that the incarcerated debtor's relatives may visit him, and he may engage in legal dealings such as trading, gifts, charity, and acknowledgement of debts to non-relatives. Finally, the majority of Ḥanafīs ruled that the incarcerated person should also be prevented from his normal work, so as to pressure him into repaying the debt.

- The Mālikīs ruled<sup>87</sup> that a debtor may be preemptively incarcerated if he is known or suspected to be able to repay his matured debt. He may thus be incarcerated until he provides proof of his inability to pay, or until someone provides him guaranty, in which cases he may be released.

However, if the debtor asks for a short grace period (say two days) to repay him, he should be given that grace period. Moreover, if a guarantor guarantees the debtor's debt, then the latter may not be incarcerated in lieu of the guaranteed debt. In contrast, if a rich creditor does not ask for a short extension, and does not provide a guarantor, he may be incarcerated in lieu of his matured debt until he repays it. However, the judge is not authorized to sell the rich debtor's property to repay his debts in this case, in contrast to the case of a bankrupt debtor. This is a difference between the rulings for a transgressing rich debtor, and an interdicted bankrupt debtor who is prevented from dealing in his own property. If the incarcerated debtor is a woman, she should be incarcerated in the company of a trustworthy woman. Moreover, a grandfather may be incarcerated in lieu of a debt owed to his grandson, and a child may be incarcerated in lieu of a debt owed to his father, but a father may not be incarcerated in lieu of a debt he owes to his son.

If the debtor can prove his inability to repay, through accepted testimony that he is not known to have any manifest or hidden properties, and he swears that he has none, then he should be given a grace period until his financial situation improves. In this case, he may not be incarcerated, and the creditors may not demand repayment until his financial situation does improve. Moreover, he may not be forced to work or borrow to repay the

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<sup>87</sup> Al-Dardīr ((Mālikī)B, vol.3, pp.368-71), Al-Dardīr ((Mālikī)A, vol.3, pp.278-82), 'Ibn Juzayy ((Mālikī), p.318).



debts, even if he is capable to work or borrow. The latter rulings follow from the fact that the debt was established as a liability on him, and repayment may only be demanded after he accumulates sufficient wealth to repay it, and not before.

Finally, if the judge could not prove that the debtor was rich or poor, but incarcerated him on the assumption that he was wealthy, the debtor may be released after a sufficient period of incarceration to ascertain that had he had any wealth he would have paid the debt rather than stay incarcerated. However, if there are signs that suggest that the debtor is rich, then he may only be released from incarceration if he can provide material proof of poverty. Moreover, if a person is known to be rich, then he may be incarcerated indefinitely until he repays his debt and/or provide a guarantor for his debt.

- The Shāfi'īs and Ḥanbalīs ruled<sup>88</sup> that a rich debtor must repay his debt as soon as possible after repayment is demanded. Then, if he refuses to repay his debt, and he happened to have manifest property of the same genus as the debt, the debt may thus be repaid from that property. If the manifest property was of a different genus, then the judge may sell his property with or without his permission. If the judge cannot gain access to the rich debtor's property to sell it, then he may incarcerate him or coerce him otherwise to sell it. Moreover, if he is known to be rich, but his property was hidden and his creditor demanded his incarceration, the judge may incarcerate him to release his property and enable him to repay his debt. If incarceration proves to be insufficient penalty to convince the debtor to repay his debt, the judge may have him beaten or punished otherwise, even if the cumulative penalties prove to be excessive.

If the debtor claims that he is incapable of repaying his debt, but the creditor disbelieves him, then the debtor may be incarcerated until he provides material proof of poverty. Then, if it is established that he is incapable of repaying his debt, he must be given a grace period until he is able to repay, as per the verse [2:280].

In contrast, if there is proof that the debtor is able to repay his matured debt but refuses to do so, the judge may incarcerate him<sup>89</sup> based on the above cited Ḥadīth: "A lingering debtor who refuses to pay despite his ability is a transgressor, and thus it is permissible to complain about his transgression, and to punish him". In this regard, the judge is not allowed to release the incarcerated debtor until he receives proof that he is poor,

<sup>88</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.154,157), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.406-9), 'Ibn Qudāmah (, vol.4, pp.447-50), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.320).

<sup>89</sup>Shaykh Taqiyyu-ddīn 'ibn Taymiyyah said: "Incarceration does not necessarily mean keeping him in a specific place. What is meant by incarceration in this case is preventing him from engaging in dealings until he fulfills his obligations. Thus, he may be incarcerated in his own home, thus being prevented from leaving it", c.f. Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.408).



or until the debt is absolved by repayment, absolution, transfer, etc. In the latter cases, the debtor's liability would cease to exist, and the creditor would thus not object to ending his incarceration.

They also ruled in agreement with the Mālikīs that the debtor may not be forced to work in order to repay his debt. This ruling is based on the above cited Ḥadīth: "Take what you find, and you have no further rights". Similarly, the debtor may not be forced to accept a gift, charity, or loan to repay his debts.

#### 4. Selling the debtor's property

Jurists are in agreement<sup>90</sup> that an interdicted bankrupt debtor's property may be sold, and its price may thus be distributed among his creditors in proportion to their debts. In this regard, it is preferable that the debtor's property is sold immediately following his interdiction, to minimize the period of interdiction, and to clear his liabilities and repay his creditors as soon as possible. Moreover, the Prophet (pbuh) interdicted Mu'adh, thus immediately selling his property and distributing the price among his creditors. Thus, if the debtor's property was of the same genus as the debts, the judge may repay the debts directly without his permission, otherwise he may sell it and repay the debts from its price.

It is recommended that the judge or his agent be in attendance at the time of sale of the debtor's property, to assure the debtor that the sale will be done fairly and properly. It is also recommended that the creditors be in attendance, since the sale is in fact performed on their behalf, and they may very well be willing to buy some of the property themselves. In the latter case, they may thus bid-up the price of the debtor's property, which may help him. Moreover, their attendance also assures them that the sale is done properly, and if any of them finds that he can get repaid in kind (if his debt is of the same genus as some of the debtor's property), some parts of the sale may be bypassed.

In contemporary times, the debtor's property should be sold in public auctions. It is also preferable that each type of property is sold in its appropriate market, provided that sales take place at the market price, with the price paid in cash in the currency of the country.

Moreover, jurists listed the order in which properties should be sold as follows:

1. Perishable items (e.g. fruits and vegetables), then
2. Properties to which rights are attached (e.g. through pawning), then

<sup>90</sup>Ibn Al-Humām ((Ḥanafī), vol.7, p.328 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.199 onwards), Al-Dardīr ((Mālikī)B, vol.3, pp.357 onwards, 366), Al-Dardīr ((Mālikī)A, vol.3, pp.269-71), 'Ibn Juzayy ((Mālikī), p.319), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.150 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.322), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.420 onwards), 'Ibn Qudāmah (, vol.4, pp.441-6), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.287).



3. Animals (since they are somewhat perishable, and require a cost to up-keep), then
4. Movable properties (since they may be sold or otherwise lost), giving clothes priority over copper pots and other movable objects, then
5. Immovable properties, giving priority to buildings over land. Those come last since they are least likely to perish or get stolen. Moreover, immovable assets are typically bought as long-term investments, and thus must only be sold if absolutely necessary.

To ensure that immovable assets are not sold too cheap, the Mālikīs stipulated that a two-month period should be allowed for selling such assets. 'Abū Ḥanīfa went further by not allowing a judge to sell the personal belongings and immovable objects of the debtor, but 'Abū Yūsuf and Muḥammad disagreed with this ruling.

Jurists agreed that a bankrupt debtor must be spared his normal wardrobe. The Shāfi'īs and Ḥanbalīs further ruled that he should be allowed to keep food-stuffs to feed himself and his dependents (e.g. his wife, his servant, and dependent relatives) for a day. In this regard, the Ḥanafīs ruled that expenditures on such dependents may be taken out of the debtor's property after interdiction and before the declaration of bankruptcy. The Mālikīs were more lenient, allowing the bankrupt debtor to keep enough food for a number of days. Moreover, jurists ruled that the debtor should be allowed to keep the tools of his trade (and the scholars should be allowed to keep his books). However, the Mālikīs allowed the sale of books and fancy clothes if they are valuable. With regards to the sale of books, they argued that knowledge should be kept in the heart. However, Al-ʿAllāmah Al-ʿAdawī argued that scholarship was no longer tied to memorization, and thus some Mālikīs treated the scholar's books the same as the worker's tools.

Some jurists also allowed the debtor to keep his primary residence and his necessary servant, provided that they are not excessive for people of his socio-economic class. They based this ruling on the view that those are basic necessities, similar to his food and clothing, and thus may not be sold to repay his debts. In contrast, the majority of Shāfi'īs ruled that the debtor's house, means of transportation, and servants that in the past were possible to sell. Their counter-argument was that residence, transportation, etc. were indeed basic needs, but ones that can easily be obtained through leasing. Regarding servants, the Mālikīs ruled that if the debtor had a servant, then he should be sold if he can be sold for a price, otherwise if he cannot be sold, the labor of that servant can be leased.

## 5. Taking repayment in kind

The non-Ḥanafī jurists ruled that if the creditor had access to the property that the bankrupt debtor owed him, then he may take it, thus taking repayment



in kind. In contrast, the Ḥanafis ruled<sup>91</sup> that if the judge declares a person's bankruptcy, and he was in possession of a specific property that he bought but whose price he had not paid, that creditor/seller is equal to all others in repayment rights. On the other hand, if the debtor's bankruptcy was established prior to his receipt of that property, or after receiving it without the seller's permission, the seller may thus recall the property or may incarcerate him in lieu of liability for the price prior to receipt.

Thus, in the case of bankruptcy that is declared after the debtor received the goods but before paying their price, the Ḥanafis ruled that the seller is not entitled to recall the merchandise. They based this ruling on the view that bankruptcy makes delivery of the merchandise impossible in commutative contracts (but not in others). In this case, they argued, the seller has no basis on which to void the sale and recall the merchandise, since the buyer at that time only owes him the price, established as a debt. Thus, even if the bankrupt buyer had not yet received the object of the sale that was concluded prior to bankruptcy, he remains entitled to receive the merchandise, thus exchanging it with the established liability for the price.

In contrast, the non-Ḥanafis ruled<sup>92</sup> in this case that the seller is allowed to void the sale and recall the merchandise. They based this ruling on the view that the buyer was declared incapable of paying the price, by virtue of bankruptcy, and thus the seller's right to void the contract is established in analogy to the buyer's right to void a sale if the seller is unable to deliver the merchandise. In general, they argued, a commutative contract may be voided if one of the compensations (e.g. the object of *salam*) proves to be undeliverable. Moreover, they provided proof for this ruling by the Ḥadīth narrated on the authority of 'Abū Hurayrah: "Whoever has access to his property in the possession of a bankrupt person, he is most worthy to take that property".<sup>93</sup>

The Ḥanafis argued that this Ḥadīth used by non-Ḥanafis as proof for their ruling is contradicted by what Al-Khaṣṣāf narrated, that the Prophet (pbuh) said: "If a man becomes bankrupt, and another finds his property in his possession, the latter is equal to all the creditors of the former". They thus reinterpreted the Ḥadīth of 'Abū Hurayrah by restricting it to the case wherein the buyer received the merchandise with an established option for the seller.

It is clear that the opinion of the non-Ḥanafis in this regard is more solid, since the Ḥadīth of 'Abū Hurayrah is valid, and not contradicted by other Ḥadīths. Moreover, the reinterpretation of this Ḥadīth by the Ḥanafis seems unfounded, since the Ḥadīth is irrelevant in the case where the seller has an option to void the sale. Moreover, their reinterpretation is even weaker if the

<sup>91</sup>'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.106), 'Ibn Al-Humām ((Ḥanafī), vol.7, pp.330 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.201 onwards).

<sup>92</sup>'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.283 onwards), Al-Dardīr ((Mālikī)B, vol.3, p.373), Al-Dardīr ((Mālikī)A, vol.3, p.282), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.322), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.157 onwards), 'Ibn Qudāmah (, vol.4, p.409 onwards), 'Ibn Juzayy ((Mālikī), p.319).

<sup>93</sup>This is a valid Ḥadīth narrated by the major narrators of Ḥadīth on the authority of 'Abū Hurayrah. There are other supporting narrations on the authorities of Samurah, and 'Abū Bakr ibn ʿAbdul-Raḥman ibn Al-Ḥārith ibn Hishām, c.f. Al-Shawkānī (, vol.5, p.242).



property was a deposit, simple loan, or found object, since the Ḥadīth is clearly tied to the case of bankruptcy.

There are a number of other issues pertaining to taking one's property from the possession of a bankrupt individual. In what follows, we shall discuss the most important issues mentioned by jurists:

1. The Shāfi'is and Ḥanbalīs have two reported opinions regarding whether the owner of the property has the option to take it only immediately, or whether that right remains indefinitely.<sup>94</sup> The more correct of the two opinions is that the option to take or recall property in this case is only valid if executed immediately. This ruling is made in analogy to the ruling for the defect option, since both options are legalized to prevent harming anyone's rights. In this regard, allowing the option to recall one's property to hold indefinitely would harm the rights of other creditors by holding their rights hostage to the decision of the option-holder.
2. The Shāfi'is ruled<sup>95</sup> that the owner of the property in this case has the right to recall it if the debtor obtained it through any purely commutative contract such as sales, leases, loans, and *salam*. They based this ruling on the generality of the Ḥadīth of 'Abū Hurayrah cited above. Thus, if a man leased his property to another and had not yet received due rent, then if the lessee's bankruptcy is declared, the lessor has the right to void the lease (thus treating the usufruct of property as an object of sale). Similarly, loans and *salam* may be voided if the debtor's liability for repayment or delivery is matured and his bankruptcy is then declared.

On the other hand, non-commutative contracts (e.g. gifts) and partially commutative ones (e.g. marriage and accepting a financial compensation instead of physical retribution for murder) may not be voided by virtue of bankruptcy.

3. The Shāfi'is stipulated three conditions for the owner of a property to recall or take it from the bankrupt debtor:<sup>96</sup>
  - (a) The price must be due at the time of recalling the merchandise. Thus, it is not permitted to recall the merchandise if the price was deferred, since it is not appropriate to demand repayment of a deferred debt.
  - (b) Bankruptcy must make payment of the price impossible. Thus, the sale is not voided if the bankruptcy is removed and the debtor refuses to pay despite his ability to, or if he escapes or dies and his heirs refuse to pay the price or return the merchandise. In all such cases, receipt of the price is possible through legal means.

If receipt of the price is indeed impossible due to bankruptcy, the seller is not obliged to accept a monetary compensation from the

<sup>94</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.158), 'Ibn Qudāmah (, vol.4, p.410).

<sup>95</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.158).

<sup>96</sup> *ibid.*



creditors in lieu of the merchandise. Rather, the *Shāfiʿis* and *Ḥanbalīs* ruled that he retains the right to void the sale, since his right is attached to his own property, and receiving compensation from other creditors may be viewed as a favor to him. In contrast, the *Mālikīs* ruled that if the creditors wish to compensate the seller financially, he has no right to recall the merchandise, since he would receive the price in full. Thus, the latter ruling is reasoned by analogy to the case of defective merchandise from which the defect is removed, in which case the buyer's option to return the merchandise is voided.<sup>97</sup>

- (c) The buyer must continue to own the merchandise at the time of recall. Thus, if the buyer had died, re-sold the merchandise, given it as a gift, or established it as a mortmain, the seller is no longer capable of recalling the merchandise by virtue of the buyer's bankruptcy.

From all of the preceding, we can thus enumerate nine conditions for recalling a property from a bankrupt debtor:<sup>98</sup>

- (a) The property must have been obtained through a purely commutative contract (e.g. sale).
- (b) The property recall must be demanded immediately after interdiction becomes known to the owner.
- (c) The owner may recall the property by saying: "I have voided the sale", or something to that effect, without necessarily receiving a court order.
- (d) No part of the compensation for the property (e.g. price) must be received. If the seller had received part of the price prior to interdiction, he may recall a portion of the property corresponding to the un-received part.
- (e) The non-payment of the compensation must be caused by bankruptcy.
- (f) The un-received compensation must be fungible. Thus, if the compensation was non-fungible, he will have a priority over other creditors in his claim to that non-fungible property of the debtor/buyer.
- (g) The debt must be due.
- (h) The sold property must still be owned by the bankrupt debtor.
- (i) There must be no other rights associated with the property (e.g. it must not be pawned in lieu of another debt).

The *Ḥanbalīs* listed five main conditions for a seller to recall his merchandise from a bankrupt buyer, and *Al-Buhūtī* (3rd printing (*Ḥanbalī*)) added two more:<sup>99</sup>

<sup>97</sup> *Al-Dardīr* ((*Mālikī*)A, vol.3, p.283), *Al-Dardīr* ((*Mālikī*)B, vol.3, p.373 onwards), *Al-Khaṭīb Al-Shirbīnī* ((*Shāfiʿī*), vol.2, p.159), *Ibn Qudāmah* (, vol.4, p.411).

<sup>98</sup> *Al-Khaṭīb Al-Shirbīnī* ((*Shāfiʿī*), vol.3, p.160).

<sup>99</sup> *Ibn Qudāmah* (, vol.4, pp.413,419,430,431,434,453), *Al-Buhūtī* (3rd printing (*Ḥanbalī*), vol.3, pp.414-7).



- (a) The merchandise must be intact. Thus, if any part of it had perished (e.g. the fruits on sold trees), the seller becomes equal in priority to all other creditors. In contrast, the Mālikīs and Shāfi'īs ruled that he may recall the remaining part of the merchandise, and share with other creditors in his compensation for the perished part. This condition corresponds to the eighth condition of the Shāfi'īs.
- (b) There must be no contiguous increase in the merchandise (e.g. fattening, or aging). In contrast, the Mālikīs and Shāfi'īs did not make this a condition for recall.
- (c) The seller must not have received any part of the price. Thus, if he had received part of the price, his right to recall the merchandise is dropped. This corresponds to the fourth Shāfi'ī ruling. In contrast, the Mālikīs ruled that the owner/seller has the option of returning the part of the price he had received and recalling the entire property, or sharing with other creditors in his demands with no priority for the merchandise.
- (d) There must be no rights of others attached to the property. Thus, if the buyer had pawned the property or given it as a gift, the seller has no right to recall the merchandise, in analogy to the case where the merchandise was re-sold. This is the ninth Shāfi'ī condition, on which the Shāfi'īs, Mālikīs, and Ḥanbalīs are in agreement.
- (e) The bankrupt debtor/buyer must be alive. Thus, if he had died, the seller will have no priority over other creditors, regardless of whether bankruptcy and interdiction preceded death or vice versa. The Mālikīs agreed with this ruling, based on the Ḥadīth of 'Abū Bakr ibn 'Abdul-Raḥmān: "If the buyer dies, then the seller/owner has the same priority as other creditors".<sup>100</sup> In contrast, the Shāfi'īs ruled that the seller has the right to void the sale and recall the merchandise, based on the above cited Ḥadīth of 'Abū Hurayrah.
- (f) The buyer must have continued to own the merchandise, without transferring its ownership through a sale, gift, etc.
- (g) The seller must be alive at the time of recalling the merchandise.

The Mālikīs listed three conditions in this regard:<sup>101</sup>

- (a) The other creditors must not have offered to compensate the seller financially for the price of merchandise. Thus, if they pay him from their own property or that of the debtor, or if they or others guarantee the price for him and they are deemed trustworthy, then he is not allowed to recall the merchandise.

<sup>100</sup>Narrated by Mālik in *Al-Muwatta'*, and by 'Abū Dāwūd, with an incomplete chain of narration. The latter narration is also weak, c.f. Al-Shawkānī (, vol.5, p.242).

<sup>101</sup>Al-Dardīr ((Mālikī)A, vol.3, p.283), Al-Dardīr ((Mālikī)B, vol.3, p.374 onwards).



- (b) The property must be possible to recall. Thus, if a woman's husband declares bankruptcy, and she demanded her dowry after the marriage was consummated and his bankruptcy was declared, she has no priority over other creditors. This follows since it is impossible for her to "recall" what she had given her husband. On the other hand, if the husband's bankruptcy is declared prior to consummation of the marriage, she may void it at that time.<sup>102</sup>
  - (c) The property must be in the same state, without change from the date of sale. Thus, if the merchandise had changed (e.g. if sold wheat was ground, or sold cloth was made into a dress, etc.), the seller has no priority over other creditors. This includes the mixture of the merchandise with a different property, even if it was possible to separate them (e.g. if honey was mixed with oil). However, if the merchandise was mixed with similar goods, or the change was reversible (e.g. dying of sold cloth or leather, or weaving of thread into cloth), or if the merchandise was changed by natural causes or the actions of the buyer or a third party, and was then the change was reversed, the seller may thus recall it. If the defect continued to exist, the seller has the option to recollect the defective property, and share with other creditors in demanding compensation for the difference, or to share with the creditors with a claim for the full price.
4. If the merchandise increased in the bankrupt buyer's possession, we need to distinguish between multiple cases:
- (a) The increase may be contiguous, e.g. the sold property may grow in size, age or abilities. The Mālikīs, the Shāfi'īs, and one of the narrated opinions of 'Aḥmad stated that such contiguous increase does not prevent the seller from recalling the merchandise. The Mālikīs exclude from this ruling the case wherein other creditors offer to pay him the price. In contrast, the Ḥanbalī jurist Al-Kharqī ruled that such contiguous increase does prevent the seller from recalling the merchandise. The latter appears to be the accepted opinion among Ḥanbalīs, since all their books list it thus.<sup>103</sup>
  - (b) The increase may be separate, e.g. fruits or offspring that materialized while the merchandise was in the buyer's possession. The Mālikīs, Shāfi'īs, and Ḥanbalīs agree that such increases do not prevent the seller from recalling the merchandise if the buyer's bankruptcy is declared. In this case, the seller may recall the original merchandise without the increase. Thus, the increase remains with the buyer,

<sup>102</sup>This is only a parenthetical digression, since the main topic here pertains to merchandise that was received prior to bankruptcy. In the latter case, the husband received nothing prior to the declaration of his bankruptcy.

<sup>103</sup>Al-Dardīr ((Mālikī)A, vol.3, p.283), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.161), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.324), 'Ibn Qudāmah (, vol.4, p.419), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.416), 'Ibn Juzayy ((Mālikī), p.320).



since the Legislator only established the seller's right to recall the merchandise that he sold, and he may not take more than that.<sup>104</sup>

- (c) An increase may ensue in the merchandise due to dying. For instance, if a man bought cloth from another, dyed it, and then his bankruptcy was declared, the Mālikīs, Shāfi'īs and Ḥanbalīs agree that the seller retains the right to recall the merchandise. In this case, the bankrupt buyer becomes a partner of the owner of the cloth for the increase in its value due to dying, the increase belonging to the buyer.<sup>105</sup> Another reported opinion among the Ḥanbalīs stipulates that the seller is not allowed to recall the merchandise increased in value due to the dying. The latter ruling is based on the view that this type of increase is contiguous, and the increase belongs to the buyer, and thus the situation is analogous to fattening of a sold animal.
- (d) The increase may be the erection of buildings or planting of crops in a sold land:

- The Mālikīs ruled<sup>106</sup> in this case that the seller is not allowed to repossess the land after buildings were erected on it or crops were planted in it. Thus, he must participate with other creditors in demanding compensation for his credit.
- The Shāfi'īs and Ḥanbalīs ruled<sup>107</sup> in this case that it is permissible for the seller to recall the land, provided that the bankrupt buyer and his creditors agree to remove the buildings or crops from the land. The buyer and his creditors have the right to remove such additions, and if they do, then the seller may repossess his land. In this case, the expenses of returning the land to its original state should be paid from the bankrupt buyer's property. On the other hand, if the buyer and his creditors refuse to remove the additions, they may not be forced.

Another reported opinion in their schools is that the seller has the right to repossess the land with the additions, and he may then remove the additions and compensate the bankrupt buyer for the diminution in his wealth due to that removal. The latter ruling is based on the view that all of the property of the bankrupt individual is subject to sale in any case, and the loss to his property can be compensated in both ways. Thus, he may be regarded as a partner with the land owner for the increase he put in the land, in analogy to the case of leather or fabric that increased in value due to dying.

<sup>104</sup> *ibid.*, Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.418).

<sup>105</sup> Al-Dardīr ((Mālikī)A, vol.3, p.283), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.164), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.325), 'Ibn Qudāmah (, vol.4, p.417), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.418).

<sup>106</sup> 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.285).

<sup>107</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.162 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.325), 'Ibn Qudāmah (, vol.4, p.426 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.427).



However, the best supported opinion among the Shāfi'īs and Ḥanbalīs is the impermissibility of repossession of the land in the case of added buildings or trees, and thus the increase remains intact as the bankrupt buyer's property. They based this ruling on the view that the bankrupt buyer and his creditors would be harmed if the seller is allowed to repossess the land, and it is not appropriate to remove one harmful set of consequences (the seller's potential loss) with another (the potential loss to the buyer and his creditors). Instead, they ruled that the seller should demand payment of the price on equal footing with all the creditors. Thus, the majority opinion of the Shāfi'īs and Ḥanbalīs agrees with the Mālikī ruling.

On the other hand, if the increase was a crop, the Shāfi'īs ruled<sup>108</sup> that the seller may repossess the land. They based this ruling on the view that the seller's property (the land) was intact, and simply occupied by a movable object (the crop). Thus, they ruled in analogy to the case where the sold object was a house, and the increase was movable furniture belonging to the buyer. Thus, if the crop was reaped, it must be moved out of the land. If the crop was not yet reaped, it may be left until harvest time, without payment of rental for the land since the buyer planted the crop in his own land. The last ruling follows by analogy to the case where a person sold his land after planting a crop, wherein ownership of the land is transferred, but the crop is kept until harvest time without payment of rent.

- (e) The change may be a transformation of the merchandise, e.g. grinding of wheat, baking of flour, oil used to make soap, etc. In all such cases and similar transformation instances, the merchandise is transformed to the point where its name changes (e.g. wheat becomes flour, flour becomes bread, oil becomes soap, etc.). The Mālikīs, and the Ḥanbalīs and most of the Shāfi'īs agreed in this case that if the buyer's bankruptcy is declared after he transformed the merchandise thus, the seller no longer has the right to repossess it, provided that the transformation increased the value of the merchandise. On the other hand, if the transformation does not add to the value of the merchandise, then the seller may repossess the merchandise, and the bankrupt buyer is not entitled to any compensation.<sup>109</sup>
- (f) The merchandise may be mixed by another property to the point where the two are indistinguishable (e.g. oil with oil, etc.). In this case, the Mālikīs, Shāfi'īs, and Ḥanbalīs ruled that the seller is not allowed to recall the merchandise. However, the Mālikīs said that if

<sup>108</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.326).

<sup>109</sup>Al-Dardīr ((Mālikī)A, vol.3, p.283), Al-Dardīr ((Mālikī)B, vol.3, p.374), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.163), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.325), 'Ibn Qudāmah (, vol.4, p.416).



the merchandise was mixed with identical property, then the seller is allowed to recall what he sold. The Shāfi'is also ruled that if the merchandise was mixed with the same or lower quality property, then the seller is allowed to take the sold amount of the mixture. However, they ruled that if the merchandise was mixed with higher quality goods, then the seller cannot recall the merchandise, and may only demand payment of the price on par with the other creditors.<sup>110</sup>

- (g) If the merchandise is diminished in quality or characteristics, the Mālikīs, Shāfi'is and Ḥanbalīs ruled that the seller may still recall the merchandise, since such diminution does not disqualify the latter from being the seller's property. The Shāfi'is and Ḥanbalīs ruled in this case that the seller is given the option of taking the diminished property and dropping his claim for the price, or sharing his demand for the full price on par with all the other creditors. This ruling is based on the rule that price cannot be decomposed into quality portions, and thus the ruling must be made in analogy to the case where the merchandise declined in value due to a movement in market prices. In contrast, the Mālikīs ruled that the seller has the option of taking the diminished merchandise and sharing his demand for the diminished amount on par with the other creditors, or sharing his demand for the full price on par with the other creditors. The latter opinion is also shared by the Shāfi'is in the case where the merchandise is partly destroyed due to the transgression of a third party.<sup>111</sup>

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<sup>110</sup> Al-Dardīr ((Mālikī)A, *ibid.*), Al-Dardīr ((Mālikī)B, *ibid.*), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), *ibid.*), 'Ibn Qudāmah (, vol.4, p.415), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.326).

<sup>111</sup> Al-Dardīr ((Mālikī)A, *ibid.*), Al-Dardīr ((Mālikī)B, *ibid.*), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.324), 'Ibn Qudāmah (, vol.4, p.414), 'Ibn Juzayy ((Mālikī), p.320).



## Chapter 98

# Ending Interdiction

It is well established in Islamic Law that a legal ruling is predicated upon its instigating factor. Thus, interdiction is only legalized by its instigating factors, and must thus be ended if those instigating factors cease to exist. We have studied the issue of ending interdiction in the chapter on the legal consequences thereof. In this chapter, we shall summarize the rulings pertaining to the ending of interdiction.

### 98.1 Mental incompetence & insanity

An interdiction based on mental incompetence is ended if proof or signs are provided to show that the interdicted attained discernment. The majority of jurists in this case required a court order to end the interdiction, since they ruled that the establishment of such interdiction required a court order. Muḥammad ibn Al-Ḥasan and 'Ibn Al-Qāsim held the minority dissenting opinion that a court order is not required to remove interdiction in this case. On the other hand, all jurists agree that interdiction based on insanity or idiocy can be removed if the person returns to sanity and discernment, without need for a court order.

### 98.2 Interdicted children

Jurists differed in their rulings for interdicted children. The Ḥanafīs and Mālikīs allow interdiction to be removed for some of the dealings of a non-discerning child when he reaches the age of seven. On the other hand, interdiction of discerning children may be removed in one of two ways:<sup>1</sup>

1. The non-Shāfi'īs ruled that if the child's guardian authorizes him to trade, he is thus released from interdiction in all dealings that may be beneficial or harmful. In contrast, the Shāfi'īs ruled that the interdiction of a discerning child is not removed, even if he is authorized to trade.

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.171), 'Ibn Qudāmah (, vol.4, p.457).



2. The non-Mālikīs ruled that if the child reaches puberty in a state of sanity and discernment, he is thus released from interdiction without need for testing by the guardian or a court order.

In contrast, the Mālikīs ruled that if the child's father was alive when he attained discernment and puberty, then his interdiction may be removed without need for a court order. However, if the child is under the supervision of a father's plenipotentiary, then his interdiction is removed if the plenipotentiary witnesses in public his conviction that the child is discerning, without need for a court order. The Mālikī jurist 'Ibn Juzayy ruled that a court permission is required in addition if the child was under the supervision of a court-appointed guardian. However, the more correct opinion is that stipulated in Al-Dardīr ((Mālikī)A) and Al-Dardīr ((Mālikī)B), that a guardian does not need the judge's permission to declare the discernment of the child upon reaching puberty.

On the other hand, the Mālikīs also ruled that the judge is always allowed to declare that he is satisfied with the discernment of any interdicted individual, thus removing his interdiction. This applies to cases where the interdicted is under the supervision of a guardian, as well as to cases where he is not.

The majority of Mālikīs further ruled that a female must remain under the guardianship of her father until one of three conditions is satisfied:

- (a) Either she marries, the marriage is consummated, and witnesses testify to her discernment in financial dealings,
- (b) Her father may declare that she is discerning, either before or after the consummation of the marriage, or
- (c) Her chosen guardian declares her discernment after the consummation of her marriage.

However, they ruled that a court-appointed guardian is not authorized to declare her discernment unless material proof can be provided to support that claim, as we have seen in previous chapters.

### 98.3 The bankrupt

We now consider the case where a bankrupt debtor's property was used or sold to repay his creditors. Would his interdiction thus end? The Shāfi'īs and Ḥanbalīs listed two opinions in this regard:<sup>2</sup>

1. The first opinion stipulated that interdiction ends once the property of the bankrupt debtor is distributed among his creditors. This ruling is based on the view that the reason for interdiction is non-existent after the distribution of his property, and thus the interdiction must be removed

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<sup>2</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), *ibid.*, p.327), 'Ibn Qudāmah (, vol.4, p.449).



in analogy to the case of an interdicted insane person whose sanity is restored.

2. The second opinion stipulated that interdiction in this case may only be removed by a judge, since it could only have been established with a court-order, in analogy to interdiction of incompetent individuals. This opinion was defended by arguing that the case of an insane individual is different, since interdiction in that case is caused by a fault in the person, and thus may be removed when that fault is no longer existent.

The court-order to interdict a bankrupt debtor should specify the objectives of interdiction explicitly. In this case, the objective of interdiction is to liquidate the assets of the interdicted and repay his debts. Then, once the objective is attained, the interdiction would be automatically revoked without need for a second court-order.



## Chapter 99

# Indebted Estates

We shall study three issues in this final chapter:

1. Do deferred debts become current upon the debtor's death?
2. The manner in which debts may be attached to the estate of a deceased individual.
3. Does indebtedness of an estate prevent its transfer to the heirs of the deceased?

In what follows, we shall study each of those issues in some detail.

### 99.1 Deferred debts

The majority of jurists, including 'Abū Ḥanīfa, Al-Shāfi'ī, Mālik, and according to one reported opinion of 'Aḥmad, ruled that deferred debts become matured upon the debtor's death.<sup>1</sup> The other case we have seen in bankruptcy was more contention, wherein the Ḥanafīs and Mālikīs ruled that deferred debts become matured upon declaration of the debtor's bankruptcy, while the other schools disagreed. Regarding the case of death of the debtor, Al-Zuhārī said that the Sunnah clearly illustrates that deferred debts become current upon the debtor's death.<sup>2</sup> This majority ruling was based on the view that Allāh (swt) did not allow heirs to take their inheritance until after all debts were paid. In the other reported opinion of 'Aḥmad, he is said to have ruled that deferred debts do not become current upon the incidence of death or insanity if the heirs can insure the deferred debt with a pawning or a wealthy guarantor.

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<sup>1</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.282), 'Ibn Qudāmah (, vol.4, p.435), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.327), *Manār Al-Sabīl* (vol.1, p.354).

<sup>2</sup>This statement is supported by the Ḥadīth narrated on the authority of 'Ibn 'Umar (mAbpwh) that the Prophet (pbuh) said: "If a man dies owing a deferred debt and being owed a deferred debt, then the one that he owes becomes current, while the one that is owed to him remains deferred to its original term", c.f. 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.327).



The majority opinion is also logically sound. For if deferred debts did not become current upon the debtor's death, then we must reason that the debt: (i) remains a liability on the juristic personality of the deceased, (ii) becomes a liability on his heirs, or (iii) becomes attached to the property. The first possibility is impossible, since the juristic personality of the deceased is obliterated upon his death, and it is impossible to demand repayment from a dead person. The third possibility is also unacceptable, since the heirs never accepted to undertake that liability, and the creditor never accepted them as his debtors, and they may not be as creditworthy as the deceased was during his life. Finally, it is not appropriate to attach the debt to the specific properties of the estate, or to defer it, since that harms the interests of the creditor and the deceased, and does not provide the heirs with any benefit. In this regard, the harm to the deceased in attaching the debt to his property is based on the Ḥadīth: "The soul of a believer remains tied to his debts until they are repaid on his behalf".<sup>3</sup>

In the meantime, the creditor would be harmed if the debt is attached to specific properties and remains deferred, since that delays his collection of repayment. Moreover, this attachment exposes him to the risk that the specific property to which the debt is attached may perish, thus dropping his right. In the meantime, the heirs are harmed since the continued deferment and attachment of the debt to specific properties prevents them from dealing in those properties. In this regard, death was never meant to void people's rights. Rather, death is meant to be a demarcation of transfer of authority and inheritance of property. In this regard, the Prophet (pbuh) said: "Whoever dies and leaves legal rights or properties behind, they thus belong to his heirs".<sup>4</sup>

## 99.2 Attaching debts to the estate

The majority of jurists ruled<sup>5</sup> that the debt remains a liability on the deceased, and is attached to his estate in analogy to the attachment of creditor rights to the property of a bankrupt debtor upon his interdiction, and also in analogy to the attachment of a debt with pawned property. This attachment protects the rights of the deceased to have his debts repaid prior to the distribution of his estate among the heirs. In this regard, the majority of Shāfi'īs ruled that this attachment of the estate to the debts of the deceased is established regardless of whether or not the debt exceeds the value of the estate, thus the entire estate is considered pawned in lieu of the debts of the deceased, and all dealings of the heir thereof are not executed prior to repayment.

Consequently, if a man sold a good and then the buyer died prior to paying the price, the Shāfi'īs ruled that the seller has a priority over other creditors to

<sup>3</sup>This is a valid Ḥadīth narrated by 'Aḥmad, Al-Tirmidhī, 'Ibn Mājah, and Al-Ḥākim, on the authority of 'Abū Hurayrah.

<sup>4</sup>Narrated by 'Aḥmad and 'Ibn Mājah on the authority of 'Ibn Karī mah, c.f. *Al-Jāmi' Al-Kabīr* (vol.3, p.178).

<sup>5</sup>*Sharḥ Al-Sirājīyyah* (p.4 onwards), 'Ibn Rushd Al-Hafīd ((Mālikī), vol.2, p.284), 'Ibn Juzayy ((Mālikī), p.319 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.144 onwards), 'Ibn Qudāmah (, vol.4, p.436), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.327).



repossess his goods, in analogy to the case of buyer bankruptcy. They based this ruling on the narration of 'Ibn 'Abī Dhi'b on the authority of 'Abū Hurayrah that the Prophet (pbuh) said: "If a man dies or if his bankruptcy is declared, the owner of property in his possession has priority for that property over other creditors". In contrast, the Ḥanbalīs, Ḥanafīs, and Mālīkīs ruled<sup>6</sup> that the owner of the property must compete on par with all other creditors of the deceased. They based this opinion on the Ḥadīth narrated by 'abū Bakr ibn 'Abdul-Raḥmān on the authority of 'Abū Hurayrah: "If a man dies or if his bankruptcy is declared, then if any of his creditors finds his property in his possession, he has no priority for that property over other creditors".

## 99.3 Inheritance

There are two reported opinions in each of the Shāfi'ī and Ḥanbalī schools regarding the transfer of ownership of the indebted estate to theirs.<sup>7</sup>

### 99.3.1 Preferred ruling

The more correct of those two opinions is that the attachment of debt to the estate does not prevent inheritance. In this regard, they argued that this attachment of debt to the estate is no stronger than the attachment of a creditor's right to a pawned property, a creditor's right to the property of a bankrupt debtor, and the right of the transgressed upon in the property of the transgressor. All such attachments of rights to property do not remove property rights for the pawning debtor, the bankrupt debtor, or the transgressor. Thus, the attachment of a debt to the estate does not prevent the transfer of its ownership to the heirs.

Thus, if the heirs deal with the estate through sales or other means, the dealing is valid, and the repayment of the attached debt becomes a liability on them. On the other hand, if it is not possible for them to repay the debt after dealing in the estate, then their dealing will thus be voided.

Any increase in the estate after the debtor's death (e.g. product, offspring, etc.) must belong to the heirs, since the increase thus was produced by property that they owned.

If a man died with no debts, and his heirs dealt in the estate, and then a debt on the deceased ensued, e.g. by returning defective merchandise, the majority of jurists ruled that the dealing would thus remain executed. However, if the heirs do not repay the resulting debt, their dealing in the estate is voided to protect the rights of the buyer/creditor.

<sup>6</sup>This is the report in 'Ibn Rushd Al-Ḥafīd ((Mālīkī)), wherein he distinguished between the cases of bankruptcy and death. In the first case, the owner has a priority, whereas in the latter, the owner is on par with all other creditors. On the other hand, 'Ibn Juzayy ((Mālīkī)) considered the two cases to be equivalent if the sold good was intact, but ruled that if it had diminished or perished, then the seller should be on par with other creditors.

<sup>7</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.145 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.327), 'Ibn Qudāmah (, vol.4, p.437).



All jurists agree that the heirs have the right to keep the properties of the estate to themselves and repay its debts from their own property. This ruling is based on the view that the heir inherits all the rights and privileges of the deceased, and the latter had the right to keep his property and repay the debt monetarily during his life.

If the property of a deceased or bankrupt person was distributed among his creditors, and then another creditor appeared, the latter may demand his fair proportional share of repayment from the other creditors. This ruling follows from the fact that the original division in this case was made based on the faulty assumption that there were no other creditors. Thus, when another creditor is found, the first division must be voided.

### 99.3.2 Minority ruling

The second and less favored opinion stipulates that indebtedness of the deceased prevents the transfer of ownership of the estate to the heirs. The proponents of this opinion cite as proof the verse: "...after the payment of legacies debts" [4:11], which dictates that inheritance shares are calculated after all debts are repaid and all contributions up to one-third of the estate are given. They thus argue that inheritance is not established until after the execution of the will and repayment of debts, and not before. Thus, they ruled that if the heirs deal in the properties of the estate prior to the repayment of debts, they are considered to be dealing invalidly in the property of others, unless the creditors permit them to do so.



## Part XVII

# Ownership and its characteristics



## Preliminaries

Ownership and its characteristics is at the heart of any economic system, past or present. Indeed, the main distinction between the two main economic systems of the past century (capitalism and socialism) revolves around issues of ownership. Thus, understanding the Islamic notion of ownership is crucial to understanding Islam's reaction to any world economic system.

In this regard, the reader will find that Islamic economic objectives agree in large part with the higher objectives served by secular economic systems, especially as they pertain to regulating ownership rights. Indeed, Islamic Law strikes the right balance between maximizing individual and social benefits. Thus, Islam protects the principle of private ownership, but regulates it to ensure social benefits.

For instance, allowing for juristic differences, public properties such as crude oil and minerals tend to be considered owned by society as a whole, represented by the national government. Moreover, many of the man-made technical legalities associated with ownership, contracts, torts, and protection of various property rights, can be traced back to the classical sources of Islamic jurisprudence. This is ample proof that the Islamic principles and the inherent justice in their juristic applications transcend time and space. May Allāh guide us always to the right path.

In this part, we shall discuss ownership and its characteristics in six chapters:

1. Definition of ownership.
2. Eligibility for ownership.
3. Types of ownership.
4. Types of limited ownership.
5. Types of unlimited ownership.
6. Constrained vs. unconstrained ownership.



## Chapter 100

# Definition of Ownership

Ownership (*al-milkiyyah*) is an Islamic Legal relationship between a human being and property, which renders the property specifically attached to him, and which gives the owner the right to deal in that property unless there is a legal impediment to a specific dealing.<sup>1</sup> In this regard, *Al-Majallah* (item #125) defined owned property as: “anything owned by a human being, be it a specified property, or usufruct of a property”. Thus, we may understand the Ḥanafī dictum: “usufruct and legal rights are owned items, but they are not property”, which rendered ownership a more general concept than property.

Jurists have given a number of similar definitions of ownership.<sup>2</sup> Perhaps the best of those definitions of ownership is: “an exclusive association of the owned item with its owner, which gives the owner the right to deal in what he owns in any way that is not Legally forbidden”.

Thus, if an individual acquired a property in a legal manner, that property becomes associated with him exclusively. Thus, he may use that property or deal in it, as long as there is no Legal impediment to such dealings (e.g. insanity, idiocy, mental incompetence, childhood, etc.). Moreover, the exclusivity of ownership forbids others from using the property or dealing in it without a Legal authorization such as guardianship, agency, etc.

In the latter cases, the rights of a guardian, plenipotentiary, or agent to deal in the property is not primitive. Rather, such rights can only be derived for such individuals who thus act as a proxy for the owner. Thus, a young child or an insane person are still considered to be the legal owners of their properties, to whom the right to deal in that property is reinstated once the Legal impediment to their legal rights is removed.

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<sup>1</sup>Ownership and other legal rights can only be established through an Islamic Legal (*sharʿī*) recognition of that right. This follows from the fact that Islam does not recognize “natural” rights. Rather, all rights must be derived from the sources of Islamic Law, as established by Allāh. Thus, legal rights are viewed as divine gifts given to individuals, with provisions to protect the best interests of society as a whole.

<sup>2</sup>Ibn Al-Humām ((Ḥanafī), vol.5, p.74), Al-Qarāfī ((Mālikī), vol.3, p.208 onwards).



## Chapter 101

# Eligibility for Ownership

The default for all properties is their eligibility for ownership. However, there may be factors that make certain properties ineligible for ownership in some or all cases. Thus, there are three types of properties with regards to eligibility for ownership:

1. **Properties that are ineligible for ownership:** This category includes properties that are specified for public usage, such as public roads and bridges, castles, railways, rivers, museums, public libraries and gardens, etc. Such items cannot be privately owned since they were specified for public usage. However, if the specification for public usage (say of a road) is nullified, then such properties return to their default state of eligibility for private ownership.
2. **Properties that can only be owned through legal means:** This category includes properties established as a mortmain, or properties of the national treasury. For instance, properties established as a mortmain may not be sold or given as a gift unless they are ruined or their expenses become higher than their income. In the latter cases, a court may give permission to replace such properties of the mortmain with other properties.<sup>1</sup>

Similarly, the properties of the national treasury or government may only be sold if the government decides that they must be sold to meet a necessity or social benefit. This ruling follows from the statement of ‘Umar (mAbpwh): “I have appointed myself for the Muslim Treasury in the same legal status as a plenipotentiary in the possession of an orphan’s wealth”. Thus, in both cases, the plenipotentiary or government official may deal

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<sup>1</sup>The Ḥanafis allowed replacing properties of a mortmain with other properties as benefit dictates. Thus, they ruled that “a just and trustworthy judge who does not have any conflict of interest may allow the property of a mortmain to be sold near its market price, provided that it did not generate enough income with which it could be restored, and provided that it is exchanged for a non-fungible non-monetary property”, c.f. ‘Ibn ‘Ābidīn ((Ḥanafī), vol.3, p.425).



in the property under his control for the benefit of the child or public, respectively.

3. **Properties that are unconditionally eligible for ownership:** This category includes all properties save for those in the previous two categories.



## Chapter 102

# Types of Ownership

There are two fundamental types of ownership: total and partial.

- Total ownership is the ownership of both a property and its usufruct. This type of ownership gives the owner all possible legal rights associated with the owned property, and it is unconditional and has no time limit as long as the property continues to exist. Moreover, ownership of such properties cannot be dropped (thus rendering the property ownerless). Thus, if a property is usurped, and the owner tells the usurper that he has dropped his ownership, it is not dropped thus. Thus, the owner remains thus despite dropping his ownership, since the property must have an owner. Various contracts (e.g. sales, inheritance, etc.) may be utilized to transfer ownership from one person to another, but such properties must have some owner at all times.

An owner in this case has full rights of using the property, investing it or in it, and dealing in it through sales, gifts, specification in a will, establishment as a mortmain, lending, leasing, etc. Thus, since the owner owns the item itself as well as its usufruct, he may deal in both (e.g. through a sale), or in the usufruct alone (e.g. in a lease or loan).

If the owner were to destroy his own property, he is not required to pay a compensation, since he cannot compensate himself. However, he may be religiously accused since the destruction of property is forbidden, and he may be interdicted legally if there is sufficient proof of his mental incompetence.

- Partial ownership is ownership of the property but not of its usufruct, or vice versa. In this regard, ownership of usufruct may be a personal right tied to the individual rather than the property (e.g. if a person inherits the right to use a property for the rest of his life). On the other hand, ownership of usufruct may be attached perpetually to the property, regardless of the individual extracting the usufruct, such as easement rights that are established only for real estate and land.



## Chapter 103

# Partial Ownership

There are three types of partial ownership, which we shall discuss in this chapter in some detail.

### 103.1 Ownership of the property alone

The property may be owned by one person, and its usufruct may be owned by another. For instance, a person may give another as part of his will the right to live in his house or to cultivate his land for the rest of his life, or for a fixed time period. In this case, after the will-writer's death, the property will be owned by his heirs through inheritance, while its usufruct will be owned by the person named in the will for the period specified therein. Then, when that specified period ends, the heirs' ownership of the inheritance becomes complete.

In this case, while the usufruct of one's property is owned by another, the owner of the property is not allowed to use the property himself, deal in the usufruct, or deal in the property itself. Moreover, the property's owner is required to deliver the property to the owner of its usufruct, and may be coerced if he refuses to do so.

This example illustrates the fact that ownership of the property itself is always perpetual, and always ends in total ownership. In contrast, ownership of usufruct is most often timed (with few exceptions such as mortmains), since the Ḥanafis ruled that usufruct is not eligible for inheritance.

### 103.2 Personal usufruct ownership

Ownership of usufruct may be established through one of five means: (i) a simple loan, (ii) a lease, (iii) a mortmain, (iv) a will, or (v) a permission.<sup>1</sup>

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<sup>1</sup>The Ḥanafis viewed the right to use a property as equivalent to ownership of its usufruct. Thus, they allow the owner of usufruct to extract it himself, or to transfer its ownership to another, unless such transfer is prevented explicitly by the property's owner or implicitly by convention. Thus, if a person establishes his house as a mortmain for housing travelers, a



### 103.2.1 Simple loans

The Ḥanafīs and Mālikīs ruled that simple loans give the borrower ownership of the lent property's usufruct without compensation. Thus, they allowed the borrower to extract usufruct himself, or to re-lend the property to a third party. However, they ruled that he is not allowed to lease what he borrowed, since loans are non-binding (i.e. the lender may recall the property at any time), while leases are binding. The latter ruling follows from the view that a weaker contract may not serve as a basis for a stronger one, as well as the fact that leasing borrowed items may harm their owner.

The Shāfi'īs and Ḥanbalīs defined simple loans as an uncompensated permission to use the lent property. Thus, they did not allow the borrower to re-lend the object of a simple loan to another.

### 103.2.2 Leases

A lease gives the lessee ownership of the leased property's usufruct in exchange for a compensation (called rent or wages). The lessee is thus entitled to extract the usufruct himself, or to have another extract the usufruct with or without compensation, provided that usage does not vary with different users. Thus, if usage does not vary with users, the lessee is allowed to sublease the property even if the lessor forbids him to. In contrast, the lessor's permission is necessary if usage varies with users.

### 103.2.3 Mortmains

When a property is established as a mortmain (*waqf*), it becomes impossible for anyone to own, and its usufruct is given to a named group of individuals. Thus, the named individuals in a mortmain are given ownership of its usufruct. Those individuals may thus extract the usufruct themselves, or to give others the right to extract usufruct if that is not disallowed in the mortmain contract or convention.

### 103.2.4 Bequeathed usufruct

If someone is given the usufruct of a property in a will, he is only entitled to the usufruct named in the will. In this regard, the recipient of such a right

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traveling student may only live in that house, but may not transfer that right to others. The same applies to rights to usufruct of public properties, which may not be transferred or sold. This is the opinion that has been enacted in civil laws.

On the other hand, the Mālikīs distinguished between the right to use a property and ownership of its usufruct. Thus, they ruled that ownership of usufruct gives the owner the right to extract the usufruct himself, or to transfer it to another with or without compensation. In contrast, they ruled, the right to use a property is simply a license to the person to use it, be it a public property or a private one. In the latter case, the person with the public license or private permission to use a public or private property, respectively, is not allowed to transfer that right to another. Thus, they ruled that ownership of usufruct is more general, c.f. Al-Qarāfī ((Mālikī), vol.1, p.18, diff.#30), and 'Ibn Al-Qayyim's *Badā'ī' Al-Fawā'id*.



may extract the usufruct himself, or allow another to extract it with or without compensation if the will allows him to lease the property.

### 103.2.5 Permission

A person may be given permission to use a property. Examples include permissions to eat various foods, general permissions to use public roads and gardens, etc. They also include private permissions to use the property of a person, e.g. ride his car or live in his house.

We have seen that the Ḥanafīs consider a permission to use a property to be tantamount to ownership of its usufruct, while the Mālikīs view it as a limited permission for the person himself to use the property. Regardless of this distinction, all jurists agree that if a person is given permission to use a property, he may not transfer that right to another through loans, permissions, or other means.

The distinction in this regard is that ownership gives the owner the right to deal in what he owns unless there is a legal impediment, while a personal permission to use some property is simply that. Thus, jurists agree that a permission to use a simple thing (*'ibāḥah*) does not entail ownership of the property or its usufruct.

#### Personal usufruct ownership

We now list some of the most important characteristics of partial ownership in the form of a personal right to use some property:

1. At its inception, partial ownership may be restricted spatially, temporally, and in characteristics, in contrast to total ownership which may not. Thus, if a person lends his car to another, he may restrict the time and distance for which the lender may ride the car, and he may specify who is entitled to ride in the car to the exclusion of others. Similarly, if a person gives the usufruct of his house in his will, he may specify a time period for that right.
2. The Ḥanafīs ruled that partial ownership cannot be inherited, since they only allow existent properties to be inherited, and they do not consider usufruct to be a property. In contrast, the non-Ḥanafīs allow the remaining period of usufruct to be inherited, since they consider usufruct to be property. Thus, the latter ruled that if a person was given the right to live in a house for one year, and died after six months, his heirs are permitted to live in the house for the remainder of the year. The non-Ḥanafī rulings in this regard seems to be more appropriate, since he agreed that usufruct is a form of property.
3. The person with a right to usufruct has the right to receive the property, even if its owner must be forced to give him access to it. Once received, the property is considered to be in a receipt of trust. Thus, the receiver



must protect the property the way he protects his own property, and he must guarantee it only against his own transgression or negligence.

4. If the extractor of usufruct does not pay a compensation for the usufruct (e.g. as in a simple loan), then he must bear the property's expenses. On the other hand, if he pays compensation for the usufruct (e.g. as in a lease), then the owner is responsible for the property's expenses.
5. Once the usufruct is extracted, the property's user must return it to its owner upon the latter's request, unless that return would harm the user. For instance, if agricultural land is leased or borrowed, then the farmer may keep the land until harvest time. However, in the latter case, the user of the land is responsible to pay the market rental value of similar land to the owner.

### **Expiration of the usufruct extraction period**

We have seen that the right to extract usufruct is temporary. In what follows, we enumerate the conditions that usher the termination of the usufruct extraction period:

1. A pre-specified period of rights to the property's usufruct may expire.
2. The property from which usufruct was to be extracted may perish or be otherwise damaged in a manner that prevents extraction of usufruct. Examples of such cases include the destruction of a house or increased salination of the soil of agricultural land. If such destruction is caused by the owner's transgression, then he is responsible to provide an alternative property.
3. The Ḥanafīs ruled that permission to extract usufruct expires upon the death of the permitted party, since they did not allow usufruct to be inherited.
4. If the usufruct is given through simple loans or leases, then the Ḥanafīs ruled that the right to extract usufruct expires upon the death of the property's owner. In the case of simple loans, this ruling follows from the fact that loans are voluntary contribution contracts, which thus expire upon the death of the contributor. In the case of leases, they ruled thus based on the fact that ownership of the leased property is transferred to the lessor's heirs upon his death.

In this regard, the Shāfi'īs and Ḥanbalīs ruled that simple loans are non-binding contracts, and thus the lender or his heirs have the right to terminate it whether or not it was timed. On the other hand, the Mālikīs ruled that timed simple loans are binding contracts. Thus, they ruled that if a person loaned another an animal to take to a certain location, he may only retake it after the borrower reaches that location or keeps it for a customary period of time.



Consequently, the majority of jurists ruled that simple loans are not terminated upon the death of the lender or the borrower. Similarly, they ruled that leases do not expire upon the death of the lessor or lessee, since leases are binding contracts, like sales.

On the other hand, if the right to extract usufruct was obtained through a will or a mortmain, then all jurists agree that the right does not expire upon the death of the will-writer or the mortmain-establisher. In the case of wills, the ruling follows from the obvious fact that the will only becomes effective upon the will-writer's death. In the case of mortmains, they are either perpetual, in which case they never expire, or they are timed, in which case they only expire at the specified time.

### 103.3 Easement rights

An easement right (*ḥaqq al-'irtifāq*) is a right associated with one immovable property (*ʿaqār*) and assigned to another immovable property belonging to another owner. It is a permanent right as long as both immovable properties exist, regardless of owners. Such rights include the right to water (*al-shirb*), the right to water-flow and drainage (*al-majrā* and *al-masīl*), the right of passage, the right of neighboring, etc. In what follows, we shall discuss those specific rights in some detail.

#### 103.3.1 Water rights

Water rights include the right for a specific amount of water to irrigate land and crops, or for human and animal drinking as well as domestic uses. With regards to those water rights, water can be classified into one of four categories:<sup>2</sup>

1. The waters of major rivers such as the Nile, the Tigris, the Euphrates, etc. are available for anyone to use personally or for his animals and land, provided that his usage does not harm others. This ruling is based on the two Ḥadīths: "People are partners in three: water, public pastures, and fire", and "No harm to others is allowed".
2. For the waters of private rivers and streams, everyone is allowed the right of personal drinking and providing drinking water for his animals. However, parties other than the river or stream's owner are not afforded the right to use them for watering their land without the owner's permission.
3. The same ruling for private rivers applies to privately owned springs and wells. If the owner of a spring or well prevents people from drinking and allowing their animals to drink from his water, they have the right to fight

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<sup>2</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.188 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.888, p.144), 'Ibn Juzayy ((Mālikī), p.339), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.255), 'Ibn Qudāmah (, vol.5, p.531).



him for the water if they cannot find other nearby sources of drinking water.

4. In contrast, nobody has a right to owned waters that are put in special containers (such as tanks, bottles, etc.) without the owner's consent. This ruling follows from the Prophet's (pbuh) prohibition of selling water unless it was possible to carry (i.e. in a container). On the other hand, if a person is in dire need of such waters and would die of thirst otherwise, he may take whatever he needs, even by force if necessary. This ruling follows from the general rule that "necessity does not overrule the rights of others". However, if the person takes the owner's water in this case, he must pay him a compensation for its market value.

### 103.3.2 Water-flow rights

The owner of a land that is far from water sources has a right to run water from the source to his land through the lands of others. The owners of land between the water-source and the ultimate user do not have the right to block the water-flow to the land of the latter. If a land-owner tries to block water-flow to his neighbor, he may be forced to remove the blockage to prevent harm to his neighbor.

### 103.3.3 Drainage rights

Similarly, a land owner has a right to run drainage (excess or used water) overland or in pipes through the land of his neighbors. The rulings for drainage (water-outflow) rights are the same as those for water-inflow rights. Thus landowners may not prevent their neighbors from running their drainage through their land to avoid their apparent harm.

### 103.3.4 Passage rights

If the owner of a piece of land needs to pass through a public or private road to get to his land, then he has the passage right in both cases. Thus, the owners of private roads that are necessary for the passage of others are not allowed to block others from their use.

### 103.3.5 Neighboring rights

Neighboring rights may pertain to the upper neighbor on his lower neighbor, or may pertain to side-neighbors on one another.

In this regard, the upstairs neighbor has a permanent right on his downstairs neighbor. This right does not perish even if the entire building is destroyed or the lower part is destroyed. Thus, the upstairs neighbor and his heirs have the right to rebuild the building whenever they wish. Moreover, both the upstairs and the downstairs neighbors are forbidden from dealing with their portion of the building in a manner that harms the other.



In this regard, if the lower floors of a building were destroyed, their owners are responsible to rebuild them, and may be legally forced to do so. If they refuse to build the lower floors, then the owners of the upper floors may rebuild them with the downstairs neighbors' or the judge's permission, and may then demand reimbursement for the rebuilding expenses. On the other hand, if the upstairs neighbor rebuilds the lower floors without permission, he may only demand reimbursement for the value of the building after it is finished, rather than for his actual expenses, since he was not in this case an agent to spend on rebuilding.

In comparison, a side-neighbor only has the right that his side-neighbor does not take any actions that cause him obvious and significant harm. Such obvious and significant harms include those that would prevent the principal use of the building (e.g. for residence), or those that constitute a structural damage to the building.

Thus, we see that all harmful neighbor actions are forbidden. However, some actions in vertical neighborhood may or may not be harmful (e.g. opening a window or door in the lower floor, or putting heavy furniture in the top floor). Jurists have differed with regards to such potentially harmful neighbor actions:<sup>3</sup>

- 'Abū Ḥanīfa ruled that such possibly harmful actions are forbidden unless the neighbor approves them. He based this ruling on the view that the default is prohibition of dealings in one's property to which the rights of others are attached, since his ownership is not unadulterated. Thus, he ruled that the neighbor is only allowed to take actions that are known to cause no harm to his neighbor, and all other actions require the neighbor's consent. This is the accepted opinion among the later Ḥanafis.
- In contrast, 'Abū Yūsuf and Muḥammad ruled that the default is permissibility of the dealings of a neighbor, unless the dealing is known to be harmful to the neighbor. This seems to be the more appropriate and logical ruling. Thus, according to this ruling, all neighbors, vertical or horizontal, have equal rights of dealing with their property in any manner that is not obviously and significantly harmful to their neighbors. Then, if the action were to result in a harm to the neighbor, the transgressor is required to compensate his neighbor for the damage he caused directly or indirectly. This is also the opinion of the Mālikīs and other schools of jurisprudence.<sup>4</sup>

## 103.4 More on Easement Rights

In this final section of the chapter, we shall discuss three issues related to easement rights:

<sup>3</sup>'Ibn Al-Humām ((Ḥanafī), vol.5, p.503), 'Ibn ʿĀbidīn ((Ḥanafī), vol.4, p.373), Al-Kāsānī ((Ḥanafī), vol.6, p.264), 'Ibn Nujaym (1334H Ḥanafī, vol., p.32), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.4, p.186).

<sup>4</sup>Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.6, p40 onwards), 'Ibn Juzayy ((Mālikī), p.341), Al-Shawkānī (, vol.5, p.261).



### 103.4.1 Easement vs. personal usage rights

Easement rights differ from the personal right to extract usufruct in four aspects:

1. Easement rights are permanently attached to immovable properties, and thus reduce the value of properties to which they are attached. In contrast, the right to personally use a property may be associated with an immovable object (e.g. leased or borrowed real estate) or a movable object (e.g. in lent books or leased cars).
2. Most easement rights pertain to immovable objects, with the exception of neighborhood rights which may pertain to an individual or a moving object. In contrast, rights to usufruct always pertain to a specific individual, specified by his name or characteristics.
3. Easement rights are permanently attached to the immovable object, regardless of the multiplicity or succession of owners. In contrast, we have seen that rights to usufruct are temporary.
4. All jurists agree that easement rights are inherited. Even the Ḥanafis accept this ruling despite their ruling that it is not property, since they still recognize it to be attached to the immovable property. In contrast, we have seen that jurists differed in opinion regarding the eligibility of rights to usufruct for inheritance.

### 103.4.2 Special rulings for easement rights

There are general rulings and specific rulings for easement rights. The specific rulings for each easement right will be discussed in great detail in later sections devoted to each of them.

The general ruling pertaining to all easement rights is permanency as long as it does not cause harm to others. However, if easement rights are found to cause harm to others, then they must be removed. Thus, drainage rights may be overruled if filthy drainage harms travelers on a public road. Similarly, drinking rights may be overruled if they harm one or more of the beneficiaries. Also, passage rights through public roads may be overruled if the driver of a vehicle over-speeds or does not follow traffic regulations. Thus, the right of passage through public roads is constrained by the condition of public safety to the possible extent.<sup>5</sup> This general ruling is again based on the Ḥadīth: “No harm to others is allowed” (*lā ḍarara wa lā ḍirār*).

### 103.4.3 Origins of easement rights

Easement rights may originate in many different ways, among which we enumerate three:

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<sup>5</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.427).



1. **Joint access:** All immovable properties close to public roads, rivers, or sewages, have established passage, watering, and drainage rights, respectively. This ruling follows from the fact that such usufruct of the public properties are shared by all individuals, and thus they all should be given access thereof as long as no harm is done to others.
2. **Stipulation in a contract:** If a seller stipulates as a sale condition that the buyer must give him passage access or watering rights in the sold land, such rights will be established by virtue of the stipulated condition.
3. **Status-quo:** If an easement right is known to exist for some immovable property (e.g. watering or drainage rights for an agricultural plot of land with regards to its neighboring plot), then it is assumed to have originated legally unless proof can be provided to the contrary. This ruling is based on the assumption that the status-quo is legally valid unless proven otherwise.



## Chapter 104

# Establishment of Total Ownership

There are four Islamic Legal means for establishing total ownership: (i) claiming commonly accessible property, (ii) contracts, (iii) succession, and (iv) derivation from owned property.<sup>1</sup> In civil law, there are six means of establishing total ownership: (i) claiming ownerless movable or immovable properties, (ii) inheritance, (iii) naming in a will, (iv) adherence to immovable or movable objects, (v) contracts, and (vi) possession through status-quo.<sup>2</sup>

Those means of acquiring ownership agree with Islamic Legal principles, with the exception of the notion of acquiring ownership through possession of a property for a long time. In this regard, Islam only recognizes statutes of limitations as a reason for not legally considering a claim of property that has been in the possession of another for a long time, for reasons of legal expediency and to avoid difficulties and suspicions regarding the distant past. However, the original ownership rights remain intact, and religious responsibility thereof does not have any statute of limitations.

Similarly, Islamic jurisprudence does not require the passage of time without claiming one's property as legal proof of dropping ownership rights. Indeed, if that were the case, usurpers and thieves could become owners after a sufficiently long time period, which would defy Islamic notions of justice. However, 'Imām Mālik is reported in *Al-Mudawannah* to have ruled, in disagreement with most of his colleagues, that possession for a long time period can drop ownership rights and/or establish new ones. In this regard, he did not specify the length of possession necessary for that ruling to take effect. Rather, he left its specification to the ruler, who may choose to base his ruling on the incompletely transmitted Ḥadīth narrated on the authority of Zayd ibn 'Aslam: "Whoever is in possession

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<sup>1</sup>Note that *Al-Majallah* (item #1248) only mentioned the first three reasons listed in the beginning of this chapter, but it was necessary to add the fourth one, since it is independent of the other three.

<sup>2</sup>c.f. the second chapter on origination of ownership rights, items #828,836,876,879,894,907 onwards in Syrian civil law.



of the property of another for ten years becomes more worthy of that property”.<sup>3</sup>

Moreover, if a property becomes physically adherent to another due to heavy rains, flooding, or sandstorms, the adherence is considered a natural increase in the property. Thus, it is accepted under the category of “derivation from owned property”.

## 104.1 Claiming ownerless property

ownerless property may be eligible for ownership, e.g. water in its spring, trees and tree-wood in the ownerless land, wild animals, and fish in the sea. Claiming ownership of previously ownerless property is characterized by the following:

1. It is the only means of establishing ownership of previously ownerless property. All other means of acquiring ownership involve transfer of ownership from one party to another.
2. It takes place through taking physical possession of the previously ownerless property, without need for language. Thus, any individual, including those who lack eligibility to conduct contracts (e.g. children, the insane, and the interdicted), may acquire ownership of property thus. In contrast, acquiring ownership through contracts and their necessary language may not be possible, or may be suspended pending the approval of another person, depending on eligibility.

There are two conditions for claiming ownership of previously ownerless property:

1. No other Muslim should have owned that property, since the legality of this form of acquiring ownership is based on the Ḥadīth: “Whoever possesses a property that no Muslim possessed before, it is thus his”.
2. Possession of the previously ownerless property must be taken with the intent of acquiring ownership. Thus, if the person takes possession of such property unintentionally (e.g. if a bird accidentally becomes trapped in his property), he is not considered its owner. For instance, if a person spread a net with the intent of hunting, then he owns whatever it traps, but if he spread it with the intent of drying it, then he is not considered to own its catch. This ruling follows from the general rule: “affairs are judged based on intent”.

There are four ways of acquiring previously ownerless property, which we shall discuss in some detail:

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<sup>3</sup>See the study *Al-Ḥiyāzah wa Al-Taḳādum fī Al-Fiqh Al-ʿIslāmī* by Dr. Muḥammad ʿAbdul-jawwād (pp.18, 50 onwards, 60, 108, 150 onwards), based on references such as *Al-Mudawwanah* (vol.13, p.23), Al-Shaykh ʿElish ((Mālikī), vol.2, p.362 onwards).



### 104.1.1 Land reclamation

Wasteland or uncultivated land (*al-'arḍ al-mawāt*) that qualifies for this category must be uncultivated land that is not owned or utilized by anyone, and that lies outside urban areas. Thus, this category excludes lands within the perimeters of a town, or external lands that are utilized as grazing grounds.

The majority of jurists ruled that reclaiming wasteland, with or without official permission, results in ownership based on the Ḥadīth: “Whoever revives wasteland owns it”. In contrast, 'Abū Ḥanīfa and Mālik ruled that a legal permission is required for land reclamation to result in ownership. In this regard, land reclamation may involve making it useful for agriculture, e.g. by digging a well, or for construction. Jurists specified the period allowed for a person to reclaim a piece of land and own it based on the statement of 'Umar (mAbpwh): “A land reclaimer has no rights if he has not reclaimed the land after three years”.

### 104.1.2 Hunting

Hunting may refer both to taking physical possession of a captured animal, bird, or fish, or through virtual capturing by means of nets or trained hunting animals and birds.<sup>4</sup> Hunting of all its forms is permissible to man as long as he is not in a state of ritual purity for pilgrimage, and as long as he does not hunt in the holy mosques of Makkah and Madīnah. The latter ruling follows from the verse: “Lawful to you is the pursuit of water game and its use as food for yourselves and travelers; but forbidden is the pursuit of land-game as long as you are in the sacred precincts or in pilgrimage garb” [5:96].

Hunting results in ownership provided that it takes effect through physical capturing, or through virtual capturing with the intention of gaining ownership. Thus, as we have seen, animals, birds, or fish caught in one's net, house, or other trap is only considered one's if one entrapped it with the intention of gaining ownership. Otherwise, if an animal, bird or fish is caught by accident and without intent of gaining ownership, it would belong to the first person to take it afterwards with such an intention.

### 104.1.3 Grass and forests

Grass cannot be privately owned, even if it grows in owned land. Thus, all people have the right to allow their animals to eat grass in public as well as private land, and the landowners are not allowed to prevent them thus. This is the preferred opinion among the four schools of jurisprudence based on the Ḥadīth: “People are partners in three things: water, grazing grass, and fire”.<sup>5</sup>

<sup>4</sup>In this regard, Allāh (swt) said: “They ask you what is lawful to them (as food). Say: Lawful unto you are all things good and pure, and what you have taught your trained hunting animals to catch in the manner directed to you by Allāh: Eat what they catch for you, but pronounce the name of Allāh over it, and fear Allāh, for Allāh is swift in taking account” [5:4].

<sup>5</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.193 onwards), *Al-Majallah* (item #1257).



Thick forest trees in ownerless lands are available to all. Thus, everyone has the right to take as much wood from such forests as he wishes, and nobody has the right to prevent others from access to such forests. Thus, whatever a person takes from such public forests becomes his. On the other hand, the government may prevent the cutting of trees, or put other restrictions on the use of forests to preserve natural resources.

In contrast, trees in owned land are not accessible to the public. Such trees belong to the landowner, and nobody is allowed to take anything from his land without his permission. In this regard, trees and grass are treated differently, since land may be bought to gain access to the trees, but jurists argued that land is never bought to access the grass therein.

#### 104.1.4 Mining and treasure-hunting

Ḥanafīs group minerals in the ground and buried treasures under the name *al-rakāz*, which literally means “whatever is underground”. The treatment of valuable properties in the ground symmetrically whether they are placed there by Allāh or by the action of man is based on the Ḥadīth: “There is a one-fifth right in *rakāz*”.<sup>6</sup> The Mālikīs, Shāfi‘īs, and Ḥanbalīs ruled that the term *rakāz* only refers to what was buried in the ground in pre-Islamic times, while *ma‘dan* (literally: metal) refers to that which was buried by Muslims.

#### Rulings for minerals

Jurists have differed in opinion regarding ownership of minerals through physical possession, and whether or not the state has a right to such minerals if they are extracted from ownerless land. On the first issue, jurists expressed two opinions regarding ownership of mined minerals:

- The majority of Mālikīs ruled<sup>7</sup> that minerals are not owned by those who take physical possession through mining. They also ruled that minerals are not automatically owned by the owners of the land under which they are found. Rather, they ruled that minerals belong to the state, and the ruler must decide how to deal in it. They based this ruling on the view that the land was originally owned by virtue of Islamic conquest of the land, and also on the view that benefit dictates giving the state control of such minerals.
- In contrast, the Ḥanafīs ruled<sup>8</sup> that minerals are owned by the owner of the land. They based this ruling on the view that the owner of a land owns every part thereof. Thus, if minerals are found in public lands, they belong to the state, but if they are found in private property, then they

<sup>6</sup>Narrated by the major narrators of Ḥadīth on the authority of ‘Abū Hurayrah, c.f. Al-Shawkānī (, vol.4, p.147).

<sup>7</sup>Ibn Juzayy ((Mālikī), p.102), Al-Dardīr ((Mālikī)A, vol.1, p.486 onwards).

<sup>8</sup>Ibn ‘Ābidīn ((Ḥanafī), vol.1, p.61 onwards), ‘Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.162), ‘Ibn Qudāmah (, vol.3, p.28; vol.5, p.520).



belong to the owner. Finally, if minerals are found in ownerless land, then they belong to whoever found them.

We shall discuss those rulings in greater detail in the chapter on mining-rights and land distribution. We shall see there that the Shāfiʿis ruled that a land reclaimer owns any hidden minerals therein, and that the Ḥanbalis ruled that he would own only the solid minerals therein.

There are also two opinions regarding the government's rights to minerals:

- The Ḥanafis ruled that whoever mines extractable solid metals such as gold, silver, iron, copper, and lead, must give one-fifth to the state, and keep the rest. This follows from the above mentioned Ḥadīth and Ḥanafī classification of minerals under *rakāz*. On the other hand, they ruled that the miner may keep whatever he finds if he extracts diamonds and precious stones, coal, or liquid minerals such as crude oil. In this regard, they argued that the government only deserves a fifth in mercury, but noting in precious stones and coal that are similar to stones, or in crude oil that is similar to water.
- The Shāfiʿis ruled that the government is not entitled to any portion of extracted minerals. They thus relied on a narrow interpretation of the Ḥadīth: “A man is not liable for his animal, his well, or his mines on his property or public property, and there is a right of one-fifth in *rakāz*”.<sup>9</sup> As we have seen, they interpreted *rakāz* narrowly to mean only buried treasures of pre-Islamic times, and ruled that there is no right of the state in minerals, including gold, silver, etc. On the other hand, they ruled based on the other proofs of Zakāh that minerals are subject to the proscribed percentages in the Zakāh literature.

### Treasure rulings

A treasure may have some sign that indicates having been buried by Muslims (e.g. a written name or Qur'anic verse), have signs that it was buried in pre-Islamic times (e.g. an idol), or it may contain neither. The early Ḥanafis ruled that treasures with no sign to indicate whether it is Islamic or pre-Islamic is automatically assumed to be pre-Islamic, while the latter Ḥanafis ruled that the default ruling after many years of Islam renders a treasure of unknown source to be Islamic.

The Ḥanafis ruled in this regard that Islamic treasures belong to their owners, and thus ownership is not transferred to whoever finds it. Instead, it is considered a *luqatah* (lost and found). Thus, whoever finds an Islamic treasure must announce that he found it. Then, if the owner is found, it must be given to him, otherwise, it must be given as charity to the poor.<sup>10</sup> In contrast, the

<sup>9</sup>Narrated by the six major narrators of Ḥadīth on the authority of 'Abū Hurayrah, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.2, p.380), *Sharḥ Muslim* (vol.11, p.226).

<sup>10</sup>'Ibn Al-Humām ((Ḥanafī), vol.3, p.207), Al-Kāsānī ((Ḥanafī), vol.6, p.202), Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.4), 'Ibn ʿĀbidīn ((Ḥanafī), vol.3, p.351).



Mālikis, Shāfi'is, and Ḥanbalis ruled that one is allowed to own and benefit from a found Islamic treasure. However, they ruled in this case that if the treasure's Muslim owner is found, the one who consumed his treasure is required to compensate him.<sup>11</sup>

On the other hand, the major scholars of all schools agreed that one-fifth of any found pre-Islamic treasury must belong to the Islamic (or state) treasury. However, they differed in opinions regarding the other four-fifths. Thus, some ruled that the rest belongs to whoever found the treasure, whether or not the land wherein it was found was owned. Others ruled that the finder only keeps the rest if he found the treasure in previously ownerless land or land that he reclaimed, otherwise the rest of the treasure must belong to the first owner of the land, or to his heirs if they can be found, or else it must all be given to the treasury.

In this regard, Syrian civil law (item #830) gave three-fifths of any found treasure to the owner of the land or building wherein it is found, one fifth to the one who found it, and one-fifth to the state treasury.

## 104.2 Ownership-transferring contracts

Perhaps the most important and most commonly used means of establishing ownership are contracts such as sales, gifts, wills, etc. There are two types of obligatory contracts that result directly in ownership:<sup>12</sup>

1. Obligatory contracts that legal authorities perform on behalf of the owner, such as selling the property of a debtor to repay his debts, or confiscating illegal property. In such contracts, the buyer gains legitimate ownership of the property through an explicit legal sales contract.
2. Obligatory nullification of ownership, which may occur in one of two cases:
  - (a) Preemption rights: The Ḥanafis give a partner or adhering neighbor the right to gain ownership of sold real estate against the will of its buyer, provided that they compensate him for the price and expenses that he paid. The non-Ḥanafis only allowed such preemption rights to partners, excluding neighbors.
  - (b) Public appropriations: The state may take possession of privately owned property in exchange for its fair market price to meet a need or public benefit (e.g. building a public road, enlarging a mosque, etc.).

The state thus establishes ownership to a party in such cases based on an obligatory sales contract.

<sup>11</sup> 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.301), Al-Dardīr ((Mālikī)A, vol.4, p.121), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.430), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.415), 'Ibn Qudāmah (, vol.5, p.636).

<sup>12</sup> *Al-Madkhal Al-Fiqhī Al-Āmm* by Professor Al-Zarqā' (p.105).



Thus, ownership-transferring contracts may be conducted by mutual consent, or they may be obligatory. We have shown that the obligatory sale may be explicit (e.g. in selling the property of a debtor to repay his debts), or implicit (e.g. in the case of exercising pre-emption rights or public appropriation of property).

### 104.3 Succession

Succession ownership may take one of two types:

1. We may have a succession of ownership of the same property, which is inheritance (*al-ʿirṭh*). This is an obligatory means of establishing ownership of the estate of a deceased person for his heirs, as proscribed by Islamic Law.
2. We may have a succession of properties owned by the same individual, which is compensation (*taḍmīn*) for destroyed, usurped, or adversely affected property. This category includes compensations for various crimes, wherein the transgressor must compensate the transgressed-upon by giving him ownership of some property.

### 104.4 Derivation from owned property

The owner of a property automatically becomes the owner of all new properties that are derived from it, whether the derivation of the new property from the old resulted from the owner's actions, or by natural causes. Thus, fruits belong to the owner of the tree, offspring belongs to the owner of the animal, and milk and wool of sheep belong to their owners (even if the owner's property was usurped at the time).

On a controversial issue, the non-Ḥanbalī jurists ruled that if a person usurped land and planted a crop therein, then he owns the crop, which is viewed as derivative of the seeds that he owned. Thus, they ruled that he would own the crop, but must pay the owner of the land the market rental rate, and guarantee for the latter any diminution in the land due to growing his crop. In contrast, the Ḥanbalīs ruled that the owner of the usurped land owns the crop, based on the Ḥadīth narrated by the five major narrators with the exception of Al-Nasāʿī on the authority of Rāfiʿ ibn Khudayj that the Prophet (pbuh) said: “Whoever plants a crop in a people's land without their permission, he has no valid claim to the crop, but he may be compensated for his expenses”. Al-Bukhārī rendered this a good (*ḥasan*) Ḥadīth.<sup>13</sup>

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<sup>13</sup> Al-Shawkānī (, vol.5, p.318 onwards).



## Chapter 105

# Is Private Ownership Absolute?

It is well known that sales, which are contracts legalized to enable the transfer of ownership, are Legally regulated in ways that protect people's natural rights regarding their property. Thus, Islamic law ensures that ownership can only be transferred in an orderly and just manner, avoiding cheating, exploitation, disputes, and unnecessary ignorance and uncertainty. Indeed, the rules that govern the defectiveness and invalidity of various contracts, thus making them forbidden in Islam, ensure that such corrupting factors are absent from ownership-transfer contracts.

This makes it necessary to ask whether private ownership is itself absolute or regulated in Islamic Law. If it is regulated, what are the constraints on the rights of owners to deal in their properties and use them in various way.

### 105.1 introduction

Economic systems through the past century, and into the current one, are usually classified into capitalist and socialist systems. The capitalist system acknowledges private property rights as well as public property, both for consumer goods and productive properties. The capitalist system tends to favor individual freedoms in the economic sphere to the highest level possible. The combined emphasis on private property rights and individual freedoms has caused capitalist systems to generate a large degree of wealth inequality between the richer groups of society (landowners, investors, etc.) and the poorer ones (farmers, wage laborers, etc.). The resulting concentration of wealth in a few hands, and various degrees of monopoly power in markets, became sources of criticism of this system, which is thus viewed to have failed in providing a better life for all of humanity. Some countries, thus, went to the other extreme, increasing the



role of states in the economic sphere, and spreading socialist ideals.<sup>1</sup>

The socialist system adopted by many countries moved closer to the other extreme, giving the state or community associations ownership of most productive resources, and limiting individual ownership and economic freedoms.

Thus, the socialist system did not abolish ownership altogether, but limited private ownership to a small set of consumer products, and limited the rights of private agents in making economic decisions. The stated goal of this system was the maximization of social equity and meeting the minimum needs of all individuals of society in order of importance. However, the implementation of this system in the Soviet Union proved to be excessively repressive to individual rights in ownership and economic decision making. Indeed, that is why most of the world today is drifting closer to the western (capitalist) system that emphasizes individual rights and freedoms.

The Islamic socio-economic system provides the happy middle between those two systems. Indeed, it is an independent system, with its own social vision that strikes a balance between the value and rights of individuals and those of society. In this regard, Islamic Law recognizes individual private ownership rights, and gives individuals a high degree of freedom in dealing with and using their property. Thus, Islam gives the individual many more economic rights and freedoms than does the socialist system. On the other hand, Islamic Law also forbids *ribā* and various forms of monopolistic and exploitative behavior to much higher degrees than does the capitalist system, thus ensuring a higher degree of socio-economic equity. Thus, the Islamic system combines the best of the socialist and capitalist systems, while avoiding their worst traits. However, we must note that Islam is not derived in any way from either system. Indeed, it is an independent system that may agree with some of the positive traits of other systems, only because the architects of those other systems saw some of the benefits of those points that are shared with the Islamic system.<sup>2</sup>

## 105.2 Property and ownership in Islam

We have seen before that Ḥanafīs define property (*al-māl*) as any good that individuals like naturally, and can save for some time. We have also seen that the non-Ḥanafīs defined it as anything with a value according to which it may be sold, and for which a transgressor must compensate the owner, to the exclusion of items discarded by all people, as stated by Al-'Imām Al-Shāfi'ī (mAbpwh).<sup>3</sup> The Ḥanafī definition renders rights and usufruct non-properties with the exception of the usufruct of a leased property. In contrast, the non-Ḥanafī definition renders usufruct a valued property that may be inherited.

On the other hand, ownership is an exclusive association of an item with

<sup>1</sup>See *'Uṣūl Al-'Iqtisād* by Professor Dr. Muḥammad Ḥelmy Murād (pp.151-183).

<sup>2</sup>c.f. *Al-Fikr Al-'Islāmī Al-Ḥadīth* by Dr. Muḥammad Al-Bahayy (p.387), *Shubuhāt Hawla Al-'Islām* by Professor Muḥammad Quṭb p.27), and *Nazariyyat Al-'Islām Al-Siyāsiyyah* by Al-Mawdūdī (p.57).

<sup>3</sup>Al-Suyūṭī ((Shāfi'ī), p.258).



an owner who has the right to deal in it in all manners, unless there is a Legal impediment.<sup>4</sup> In reality, all property is ultimately owned by Allāh (swt), as per the verse: “To Allāh does belong the dominion of the heaven and the earth, and all that is therein” [5:120]. Thus, when we only call a human being the owner of a property as a metaphor for being a trustee and vice-gerent in charge of the property: “And spend out of that whereof He has made you heirs” [57:7].

In this regard, ‘Urwah (mAbpwh) said: “I bear witness that I heard the Messenger of Allāh (pbuh) ruling that all land belongs to Allāh, and all humans are slaves of Allāh, and that whoever reclaims wasteland is most worthy of owning it”. Thus, man must follow the orders of Allāh (swt) in all dealings related to his property, since the property is ultimately owned by Allāh (swt) Himself. In this regard, all humans are equally given the divine gift of the right to hold private property. However, it must always be remembered that property is not an end in itself, but a means towards the end of satisfying the needs and wants of humans.<sup>5</sup>

In this context, it is noteworthy that never in the history of Islam was the property of a rich person taken and given to the poor without the consent of the rich, despite the hardships that were faced by Muslims at some times. Instead, the Prophet (pbuh) always urged Muslims to spend their property in charity, and reminded them of rewards in the hereafter to encourage them to spend. Thus, ‘Abū Bakr once gave all of his property in charity, ‘Umar once gave half of his wealth, and ‘Uthmān once funded an entire army with all its needs, prompting the Prophet (pbuh) to say: “Nothing that ‘Uthman does in the future can harm him after what he did today”.<sup>6</sup>

### 105.3 Constraining ownership

Some writers have argued that since all property belongs to Allāh, all mankind are slaves of Allāh, life itself belongs to Allāh, all property - even if associated by name to one person - must in fact belong to all mankind and be used for the benefit of all. They based this view on a reading of the verse “It is He who created for you all things that are in earth” [2:29], as “It is He who created all things that are in earth for all of you”. Thus, they argued that the main task of the institution of property is social, and private ownership must be subordinated to the social objectives of property.<sup>7</sup>

In this regard, Professor Muḥammad ‘Abū Zahrah said that there is no objection to saying that ownership is a social function. However, he added, we must acknowledge that it only became thus by order of Allāh (swt), and not by

<sup>4</sup> *Al-Madkhal Al-Fiqhī* by Professor Muṣṭafā Al-Zarqā’ (vol.1, p.220).

<sup>5</sup> c.f. *‘Ishṭirākiyyat Al-‘Islām* by the late Dr. Muṣṭafā Al-Sibā‘ī (p.77 onwards), and *Al-Takāful Al-‘Ijtīmā‘ī fī Al-‘Islām* by Professor Sh. Muḥammad ‘Abū Zahrah (p.14 onwards).

<sup>6</sup> c.f. “Al-Milkiyyah Al-Fardiyyah fī Al-‘Islām” by Professor Muḥammad ‘Abdullāh Kanūn, published in the Proceedings of the First Conference of Al-‘Azhar’s Majma‘ Al-Ḍamānāt<sup>c</sup> Al-Buḥūth (p.186). The Ḥadīth of ‘Uthmān may be found in ‘Ibn Ḥajar (, p.278).

<sup>7</sup> c.f. Sh. Maḥmūd Shaltūt’s article in the newspaper *Al-Jumhūriyyah* (Dec. 22, 1961 C.E.), as well as Al-Sibā‘ī (op. cit., p.80).



order of political rulers, who are not always just.<sup>8</sup> However, I think that Islam has a clear system, and borrowing such socialist-communist-Marxist terminology unfairly pushes Islam into the arena of Marxist thought, and includes an implicit denial of the natural right to private ownership.

Thus, I would not say that ownership is a social function, since the individual owner is not simply an agent of society. I would rather say that ownership has a social function as well as a private function, since the individual in Islam cares both for his individual benefit as well as for social benefits. Indeed, Islam vehemently protects the natural urges for individuals to own property for their own good, but regulates their ownership and dealings to protect social benefits while satisfying the natural individual urges.

In other words, Islam neither forbids private ownership, nor allows it to exist unconstrained. In this regard, Allāh (swt) said: “O you who believe: Eat not up your property among yourselves in vanities, but let there be among you traffic and trade in good will” [4:29], “And in their wealth and possessions are rights of the needy” [51:19], “Allāh has bestowed his gifts of sustenance more freely on some of you than on others” [16:71], and “That is the grace of Allāh which He will bestow on whom he pleases” [5:54]. In this regard also, the Prophet (pbuh) said: “A Muslim is forbidden from taking another Muslim’s blood, property, or honor”.<sup>9</sup> He also said (on the day of the farewell pilgrimage): “Your blood and property are as sacredly protected among you as the sacredness of this city and this month”,<sup>10</sup> and “It is not permissible to take the property of a Muslim without his consent”.<sup>11</sup>

Thus, it is forbidden to transgress on private property that is acquired through legal means, and the Prophet (pbuh) said in this regard: “Whoever commits an injustice equal to one foot of earth, Allāh will put around him a chain the length of seven earths”.<sup>12</sup>

Consequently, Islam stipulated various punishments for theft, usurpation, cheating, and other injustices, and ordered transgressors to compensate the owners of damaged properties.

However, the state has a right to intervene, confiscate, and return illegally acquired properties to their rightful owners, whether those properties are mobile or immobile. Indeed, that is what ʿUmar (mAbpwh) did when some of his governors gave him some property that did not belong to them. Thus, he returned those properties to protect society and to avoid having his governors

<sup>8</sup> *Al-Takāful Al-ʿIjtimāʿī fī Al-ʿIslam* (op. cit., p.23).

<sup>9</sup> Narrated by Muslim and others on the authority of ʿAbū Hurayrah, c.f. *Al-Targhīb wa Al-Tarhīb* (vol.3, p.609 onwards).

<sup>10</sup> Narrated by Muslim, ʿAbū Dāwūd, and Al-Nasāʾī on the authority of Jābir ibn ʿAbdullāh, c.f. *Jamʿ Al-Fawāʿid* by ʿIbn Sulaymān Al-Ridwānī (vol.1, p.474).

<sup>11</sup> Narrated by Al-Dāraquṭnī in his *Sunan* as “Nobody is allowed to take his brother’s property without his consent”. It was narrated in many different forms, including those by Al-Ḥākim and ʿIbn Ḥibbān in their *Ṣaḥīḥs* on the authority of ʿAbū Ḥamīd Al-Sāʿidī as “Nobody is allowed to take even the stick of his brother without his consent”, c.f. Al-Haythamī (, vol.4, p.171), Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Hadīth), vol.4, p.169), Al-Ṣanʿānī (2nd printing, vol.3, p.60), Al-Shawkānī (, vol.8, p.152).

<sup>12</sup> Agreed upon by Al-Bukhārī, Muslim, and ʿAḥmad on the authority of ʿAʿisha, c.f. Al-Shawkānī (, vol.5, p.317).



acquire riches in this manner.<sup>13</sup> Thus, true ownership may be only acquired through legitimate and legal means.

The state is also allowed to limit or eliminate legally acquired private ownership rights if equity and social benefits dictate it. Thus, the state may put limits on the rights of owners (e.g. who acquire property through land reclamation) at the inception of ownership. It may also confiscate legal private property and pay a fair compensation for it to meet social needs of the Muslims.<sup>14</sup>

In this regard, jurists are in agreement that political rulers may limit ownership rights if he finds that beneficial to society. Once such orders are issued, their violation is considered religiously forbidden, since Allāh (swt) said: “O you who believe: Obey Allāh, obey his messenger, and obey those charged with authority among you” [4:59]. In this regard, ‘Ibn ‘Abbās and ‘Abū Hurayrah said that those charged with authority in politics are the political rulers, governors, princes, etc. Al-Ṭabarī also found this ruling to be correct.

As an example of rulers who intervened to alter ownership rights, it was narrated by Muḥammad Al-Bāqir on the authority of his father ‘Alī Zayn Al-‘Ābidīn that he said: “Samurah ibn Jundub owned palm trees in an orchard owned by one of the ‘Anṣār, and he used to enter that man’s orchard with his family, which upset the ‘Anṣārī. The latter thus complained to the Prophet (pbuh), who ordered the owner of the palm trees to sell them. However, the man refused to sell it. Then the Prophet (pbuh) ordered him to cut it, but he refused. Then the Prophet (pbuh) told him to give it as a gift, and promised him its equal in paradise, but the man refused again. Then the Prophet (pbuh) said to the man: ‘You are a nuisance’, and told the ‘Anṣārī to go ahead and remove the man’s palm trees”.<sup>15</sup> Thus, the Prophet (pbuh) did not respect ownership rights that harmed others, and he is (pbuh) the one who ruled in easement rights that “No harm is allowed”.<sup>16</sup> In this regard, we also cite the narration by ‘Abū Hurayrah that the Prophet (pbuh) said: “A neighbor should not prevent his neighbor from erecting a beam in his wall”.<sup>17</sup> Moreover, it is well known that Islam legalized preemption rights to prevent harms and maximize social and individual benefits.

Another instance is narrated by ‘Imām Mālik in *Al-Muwatta’*. A man by the name of Al-Ḍaḥḥāk ibn Kḥalifah wanted to dig a ditch through the land of Muḥammad ibn Maslamah, and asked ‘Umar ibn Al-Kḥaṭṭāb for permission to

<sup>13</sup>See ‘Ibn Hajar (, p.254).

<sup>14</sup>See “Al-Milkiyyah Al-Fardiyyah wa Taḥdīdihā fī Al-‘Islām” by Professor ‘Alī Al-Kḥafīf in the proceedings of the first conference of Majma‘ Al-Buḥūth Al-‘Islāmiyyah (pp.113, 128 onwards).

<sup>15</sup>‘Abū Ya‘lā ((Ḥanbalī), p.285).

<sup>16</sup>Narrated by Mālik in *Al-Muwatta’* with an incomplete chain on the authority of ‘Amr ibn Yaḥyā on the authority of his father, and also narrated by ‘Aḥmad in his *Musnad* and ‘Ibn Mājah and Al-Dāraqutnī in their *Sunan* on the authority of ‘Abū Sa‘īd Al-Kḥudriy. It has many chains of narrations that enforce one another. The text of the Ḥadīth: “*lā ḍarara wa lā ḍirār*” refers both to causing harm to others, and to responding to the harm caused by others with harm of one’s own making.

<sup>17</sup>Narrated by Muslim, Mālik, ‘Aḥmad, and ‘Ibn Mājah, c.f. *Sharḥ Muslim*. In fact, it was narrated by the major narrators of Ḥadīth with the exception of Al-Nasā’ī on the authority of ‘Abū Hurayrah (mAbpwh).



do so. <sup>c</sup>Umar asked Muḥammad ibn Maslamah to allow him to dig his ditch to water his land, but Muḥammad said no. Then <sup>c</sup>Umar said: “Do you prevent your brother from doing something that benefits him and benefits you, since you too can use the ditch to water your land, and that does not harm you in any way?”, but Muḥammad insisted on his rejection and said: “I swear by Allāh that I will not allow him”. Then <sup>c</sup>Umar said: “Then, I swear by Allāh that he will dig his ditch even if he has to dig through your belly”. Then <sup>c</sup>Umar ordered Al-Ḍaḥḥāk to dig his ditch, which he did.<sup>18</sup> This instance provides proof that not only is it important to prevent harming others, but it is also a responsibility on each Muslim to use his property in a manner that benefits others as long as he does not have to harm himself by doing so.

The general methodology of determining the boundaries and limitations of private ownership may be based on the jurist rule: “Necessities override prohibitions”, the rule of maximizing social benefits, and the rule of preventing means of circumventing the Law. The latter rule may be utilized to prevent property owners from using them to prevent the rights of Allāh (swt), to spend unwisely or unlawfully, to cause disputes among people, to exploit others through monopolies and the like, to deprive society of its output by smuggling it abroad, etc. The rules may also be used to end extreme poverty, and to confiscate monies collected through ribā.<sup>19</sup> However, it must be noted that confiscations and other limitations on property rights must only be established as temporary exceptions whenever the need arises. Such restrictions should not be written into permanent law, and should not be allowed to go as far as destroying the principle of ownership of capital.

## 105.4 Specific ownership constraints

There are three types of constraints on ownership:

1. Constraints meant to avoid harm to members of society.
2. Constraints on certain types of properties that render them ineligible for private ownership.
3. Society and the state have certain rights towards privately owned properties.

In what follows, we shall discuss those three types of constraints in some detail.

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<sup>18</sup>c.f. *Al-Muwattaʿa* (vol.2, p.218 onwards), wherein there is another similar case with a similar ruling by <sup>c</sup>Umar.

<sup>19</sup>Ribā and monopoly are the two catastrophies that were brought along by exploitative capitalism. Those two tools gradually collect all wealth in a few hands and deprive others thereof, c.f. *Jāhiliyyat Al-Qarn Al-<sup>c</sup>Ishrīn* by Muḥammad Quṭb (p.278).



### 105.4.1 Avoidance of harm

Private ownership rights are restricted by two injunctions:

1. Avoidance of harming others. Indeed, all rights in Islam are constrained to avoid harming others.
2. Providing benefits to others if that does not cause the owner any harm.<sup>20</sup>

In this regard, jurists distinguish between four types of potential harm to others that the use of private property may cause:<sup>21</sup>

1. **Certain harm:** If some of the private owner's uses of his property are known to cause harm to others, and if the owner is capable of using his property otherwise in a way that does not harm others, then he is forbidden from using it in the harmful manner. This ruling follows from the fact that an individual harm may be tolerated to avoid a more general social harm. On the other hand, if use of one person's private property harms only one other person, then the owner's rights have precedence.
2. **Likely harm:** The same ruling applies to the uses that are known to cause harm to others, and those that are most likely to cause harm to others, since most likely circumstances inherit the legal rulings of certain ones in practical matters.
3. **Unlikely but significant harm:** Jurists differed in their opinions if certain uses of the property are likely to cause harm, but such uses are sufficiently infrequent. The Mālikīs and Ḥanbalīs ruled in this case based on the juristic ruling: "Avoidance of harm takes precedence over securing benefits". Thus, the very probability of significant harm is sufficient for them to forbid the actions that can cause it. In contrast, the Ḥanafīs and Shāfi'īs ruled that use of private property is permissible by default, and the mere probability of its causing harm is not sufficient proof that harm will be done. Thus, jurists of the latter two schools did not forbid actions in this class.
4. **Insignificant harm:** If the probability of harm is very small, or the potential harm was minimal, then the default permissibility of using one's private property is not affected by the potential of causing harm to others.

### 105.4.2 Ineligibility for private ownership

Certain types of properties are ineligible for private ownership. For instance, there are three types of property specified as social property that cannot be owned by any individual.<sup>22</sup> Those three types of property are:

<sup>20</sup> *Al-Takāful Al-'Ijtīmā'ī* by Professor Muḥammad 'Abū Zahrah (p.24).

<sup>21</sup> *ibid.* (pp.64-66).

<sup>22</sup> *ibid.* (p.29 onwards).



1. Public property providing social services, such as mosques, schools, roads, rivers, charitable mortmains, and others that would not serve their purpose unless they are publicly owned.
2. Properties that exist without human intervention, such as minerals, crude oil, rocks, water, grass, and fire. Such properties were created by Allāh, and mankind cannot claim to have helped bring them about. Thus, the Mālikīs ruled that all minerals should be viewed as state property to be used for public purposes. The Ḥanbalīs ruled similarly but only for easily accessible or liquid minerals, including salt, water, sulfur, crude oil, and certain types of gems. On the other hand, the Ḥanbalīs ruled that solid minerals that require mining are owned by the owner of the land within which they are found.<sup>23</sup> The Ḥanafī opinions in this regard are very elaborate, and the details of which can be found in their books. However, suffice it here to say that they too gave a big share to the state in most types of minerals.

The Ḥanbalī opinion in this regard was summarized by 'Ibn Qudāmāh: "In summary, apparent minerals, which are those that are easily accessible and beneficial, such as salt, water, sulfur, tar, some medications, crude oil, rocks and precious stones, and similar minerals, are not owned by the one who reclaims the land within which they are found. Indeed, it is impermissible to give private ownership of any such minerals to any individuals or to prevent Muslims from having access to such minerals, since that would be harmful and restrictive for them".<sup>24</sup>

3. **Properties that return to the state, or that are under state supervision:** The first category includes lost and found properties that reach the Muslim treasury, and for which no heirs can be found, following the rule: "The Muslim treasury is the inheritor of everyone who has no heir".

The second category includes agricultural lands captured in Islamic conquests, which are considered state-owned like minerals. For such lands (e.g. those of the Levant, Egypt, Iraq, Iran, etc.), whoever controls such land is not considered to own it completely, but only to own its usufruct. Since most Muslim lands fit into this category, the state has a right to confiscate such lands whenever necessary. However, if the state confiscates such property, it must compensate the landowners fairly.

In this regard, it is established in Sunnah that the Prophet (pbuh) made public and individually inaccessible (*ḥimā*) the area of Naqī<sup>c</sup> in Madīnah and made it a public grazing ground for the horses of Muslims.<sup>25</sup>

<sup>23</sup>'Ibn Qudāmāh (, vol.3, p.28; vol.5, p.520).

<sup>24</sup>'Ibn Qudāmāh (, vol.5, p.520).

<sup>25</sup>Narrated by 'Aḥmad and 'Ibn Ḥibbān on the authority of 'Ibn <sup>c</sup>Umar. It was also narrated by 'Aḥmad and 'Abū Dāwūd on the authority of Al-Ṣa<sup>c</sup>b ibn Juṭḥāmāh, adding that "Only Allāh and his Apostle can make land sacred or privately inaccessible". However, Al-Bukḥārī has a similar narration in which he stated that the Prophet specified Al-Naḳī<sup>c</sup> as *ḥimā*, and



It is also narrated that ʿUmar (pbuh) specified areas of land between Makkah and Madīnah, known as Al-Rabadhah and Al-Sharaf, similarly as public pastures. Then, the owners of that land complained to him saying: “This is our land, for which we fought prior to Islam, and which we became Muslims while owning. Why do you make it public?”. Then ʿUmar bowed his head and said: “All property belongs to Allāh, and all humans are the slaves of Allāh. But I swear by Allāh that were I not preparing those horses for jihad in the way of Allāh, I would not have nationalized a single square-foot of land”. It appears from this narration that the land thus nationalized by ʿUmar was of use to neighboring landowners. However, he did not hesitate to nationalize those lands for public good.<sup>26</sup> This is a precedent for the contemporary nationalizations of public utilities (e.g. water and electricity), crude oil wells, transportation roads, railroads and rivers, and other vital public utilities.

### 105.4.3 Social rights in private property

Society, or the state, has rights in private properties. Those rights have sometimes been used to destroy financial empires constructed through amassing wealth to a degree that is abhorable to Islam.<sup>27</sup> Thus, the rich must contribute to social welfare by redistributing part of their wealth to the poor, and contribute to economic stability by contributing to the state. The general social rights in the private property of the rich may be summarized in the following categories:<sup>28</sup>

1. **Zakāh:** Islam stipulated the Zakāh as an obligation on the rich, to be collected by the state that may force them to pay it. In this regard, it is important to answer some journalists who claimed that Zakāh was an insignificant charity that degrades the receiving poor. In fact Zakāh is a valid right of the poor, and a religious and legal obligation on the rich, to be collected from growing and productive properties. The Muslims have known four main categories of property that are subject to Zakāh:

<sup>26</sup>Umar specified other areas called Al-Sharaf and Al-Rabadhah similarly, c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.3, p.331), Al-Haythamī (, vol.4, p.171), Al-Shawkānī (, vol.5, p.308).

<sup>26</sup>Abū 'Ubayd's *Al-'Amwāl* (pp.294-302), Prof. Al-Khafīf's article “Al-Milkiyyah Al-Fardiyyah wa Taḥdīduha fī Al-'Islām”, op. cit. (p.108).

<sup>27</sup>There are many Qur'anic verses that clearly admonish those who amass wealth. Examples include “Those who hoard gold and silver and do not spend it in the way of Allāh, announce upon them a most grievous penalty” [9:34], “If Allāh were to enlarge the provision for His servants, they would indeed transgress beyond all bounds through the earth; but he sends it down in due measure as he pleases” [42:27], “Nay, but man transgresses all bounds when he feels self-sufficient” [96:6-7], “In order that it may not merely make a circuit between the wealthy among you” [59:7], “But seek with the wealth which Allāh has bestowed on you the home of the hereafter. nor forget your portion in this world, but do good, as Allāh has been good to you, and seek not mischief in the land, for Allāh loves not those who do mischief” [28:77].

<sup>28</sup>See *'Ishtirākīyyat Al-'Islām* by Al-Sibā'ī (pp.121, 126 onwards), *Al-Takāful Al-'Ijtīmā'ī fī Al-'Islām* by Professor Muḥammad 'Abū Zahrah (p.79 onwards).



- Livestock such as camels, cows, and sheep, which use public pastures for grazing. The appropriate percentages of zakāh from this category can be found in all books of Islamic jurisprudence.
  - The two monies: gold and silver, of which 2.5% percent are taken in Zakāh. Contemporary paper monies also fit in this category.
  - Commercial properties are subject to a 2.5% Zakāh.
  - Fruits and plants are subject to a 10% Zakāh if naturally watered, and subject to a 5% Zakāh if watered artificially.
2. **National defense:** The state is empowered to collect taxes to finance the army if the treasury does not have enough resources from its other sources of funds. Many Muslim jurists ruled thus, including Al-Ġhazālī, Al-Qarāfī, Al-Shāṭibī, 'Ibn Ḥazm, Al-ʿIzz ibn ʿAbdul-Salām, and 'Ibn ʿĀbidīn.<sup>29</sup>
3. **Meeting the basic needs of the poor:** The state is also a representative of the poor as well as the rich, and thus may ask the rich to give part of their wealth to the poor. In this regard, ʿAlī (mAbpwh) narrated that the Prophet (pbuh) said: “Allāh has proscribed a portion of the wealth of the rich sufficient to support their poor. Thus, if the rich allow the poor to suffer hunger and nakedness, Allāh will punish them severely”.<sup>30</sup> The Prophet (pbuh) was also narrated to have said: “If the people of an area allow one of them to wake up hungry, then Allāh (swt) denounces them”.<sup>31</sup>

In this regard, it was also narrated that the Prophet (pbuh) said: “There is a right in property other than Zakāh”.<sup>32</sup> In the same vein, ʿUmar (mAbpwh) said: “If I could do it all over again, I would take the excess wealth of the rich and give it to the poor”.

<sup>29</sup>See 'Uṣūl Al-Fiqh by Dr. Al-Zuhaylī (vol.2, p.765), *Al-ʿItisām* (vol.2, p.121), Al-Qarāfī ((Mālikī), vol.1, p.141), *Al-Mustasfā* (vol.1, p.313), 'Ibn ʿĀbidīn ((Ḥanafī), vol.2, p.42), 'Ibn Ḥazm (, vol.6, pp.156-9).

<sup>30</sup>Narrated by Al-Tabarānī in *Al-Awsaṭ* and *Al-Ṣaḡhūr*, and said that it had one narration through Thābit ibn Muḥammad Al-Zāhid. Al-Ḥāfiẓ 'Ibn Ḥajar said that Thābit is a trustworthy source, whose narrations were used by Al-Bukhārī and others, and the rest of its narrators are acceptable. It was also narrated with a truncated chain on the authority of ʿAlī, c.f. *Al-Targhīb wa Al-Tarhīb* (vol.1, p.538), Al-Haythamī (, vol.3, p.62).

<sup>31</sup>Narrated by Al-Ḥākim and 'Aḥmad as “Whoever hordes food for forty nights has severed his link with Allāh, and if the people of any area allow one of them to wake up hungry, then Allāh denounces them”. Its chain of narrators includes 'Aṣbagh ibn Zayd and Kuthayr ibn Murrah, the first of whom is controversial and the second of whom was unknown to 'Ibn Ḥazm but known to others. The Ḥadīth was also authenticated by 'Ibn Saʿd, narrated by others, and used as legal proof by Al-Nasāʾī, c.f. Al-Shawkānī (, vol.5, p.221). It was also narrated by 'Ibn 'Abī Shaybah and Al-Bazzār.

<sup>32</sup>Narrated by Al-Tirmidhī on the authority of Fāṭimah bint Qays, saying that the Prophet (pbuh) followed the statement by reciting: “It is not righteous that you turn your faces eastward and westward, but it is righteousness that you believe in Allāh and the last day . . .” [2:177]. However, he said that this is not the proper chain of narrations, c.f. 'Ibn Ḥajar (, p.177), *'Aḥkām Al-Qurʾān* by Al-Jaṣṣāṣ (vol.1, p.153). It was also narrated by 'Ibn Ḥazm as a saying of 'Ibn ʿUmar, Al-Shuʿabiyy, Muḥāhid, Ṭāwūs, and others, and said that the only disagreement with this view is based on the view of Al-Ḍaḥḥāk ibn Muzāḥim, whom he did not consider to be an authority.



Consequently, 'Ibn Ḥazm (, vol.6, p.452 item #725) said: "The rich of every country are responsible for the wellbeing of its poor, and their ruler may force them to do so if their Zakāh and other sources of the treasury were insufficient to support the poor. Thus, the poor must be afforded sufficient food, clothing for the winter and summer, and lodging to protect them from rain, heat, sun, and exposure".<sup>33</sup>

4. **Supporting the extended family:** All jurists agree that one is responsible to support needy parents, grandparents, children and grandchildren. However, jurists differed with regards to supporting extended family members, including siblings, uncles and aunts, etc. In this regard, the Ḥanafīs made it an obligation to support all relatives who are forbidden for marriage, such as siblings, uncles and aunts, and nephews and nieces. The Ḥanbalīs ruled that one is responsible for the support of any heir, including not only brothers and paternal uncles, but also paternal male cousins, but excluded nieces, maternal uncles, and maternal aunts.
5. **Ṣadaqat al-fiṭr:** Men are responsible to pay the obligatory charity of breaking the fast at the end of Ramadan for all dependents, including his wife, his children, and his servants.
6. **Ritual animal sacrifices:** 'Abū Ḥanīfa ruled that one ritual sacrificed animal is required each year, and all other jurists considered it a confirmed Sunnah.
7. **Pledges and expiatory gifts:** Muslims are required to fulfill all their pledges to spend money in the way of Allāh. They are also required to give expiatory gifts of food for the poor to atone for various sins and negligence in religious responsibilities for which such atonement is proscribed (e.g. lying under oath, separation from one's wife, breaking the fast before sunset, copulation during the day while fasting, etc.).

There are many other ways in which Allāh (swt) has urged Muslims to spend in His way. The state may also use other sources of wealth such as mortmain and spoils of war to assist the poor. Moreover, the state may observe economic activities to enforce the Islamic ethical and religious restrictions on markets, thus prohibiting *ribā*, monopoly, gambling, cheating, exploitation, etc.

In summary, some of the Islamic restrictions on private property are legally binding, while others are ethical and religious in nature. In this regard,

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<sup>33</sup>'Ibn Ḥazm is considered the most socialist Muslim thinker after 'Abū Dharr Al-Qhaffārī (mAbpwh). Indeed, he was among the first to derive legal rules to deal with the problem of poverty in society, and stipulated that Zakāh was only part of the financial responsibilities of the rich. Thus, he ruled that the rich are not absolved of their responsibility until poverty is eradicated, establishing minimum living standards as a right of the poor that may be enforced by the state, c.f. the paper by Dr. 'Ibrāhīm Al-Labbān on the rights of the poor in the wealth of the rich, published in the proceedings of the first conference of Majma' Al-Buḥūth Al-'Islāmiyyah (p.249 onwards).



it must always be remembered that Islam is a full system of life, with provisions that deal with social problems in every time and place.



## Part XVIII

# Ownership-Related Topics



## Preliminaries

In this final part, we shall study topics related to ownership in twelve chapters:

1. Land-related rulings.
2. Land reclamation.
3. Minerals, public lands, and land distribution.
4. Easement rights.
5. Crop sharing arrangements.
6. Division and distribution of property.
7. Property usurpation and destruction.
8. Preventing transgression.
9. Found property.
10. Lost property.
11. Prizes and rewards.
12. Preemption rights.



## Chapter 106

# Land-Related Rulings

Lands under Islamic control may be newly acquired through conquest, or may have been within Islamic land for some time. In what follows, we study the rulings pertaining to each case in some detail.

### 106.1 Conquered land

There are three types of land that Muslims may have acquired: (i) Those conquered by force, (ii) those abandoned by their owners, and (iii) those acquired through a treaty.

#### 106.1.1 Land conquered by force

The majority of Mālikīs, the Ḥanbalīs, the 'Imāmī Shī'īs, and the Zaydīs ruled that ownership of land conquered by force is automatically transferred to the conquerors. They based this ruling on the view that such lands are properties the owners of which were defeated. Thus, the defeated owners are no longer considered its owners, and the lands become ownerless and eligible for ownership by whoever can gain physical possession. The Shāfi'īs also ruled that lands and movable properties become the property of conquerors upon taking possession and dividing those properties among themselves. The Ḥanafīs clarified their ruling in this regard, by stipulating that ownership of the property is only transferred to the conquerors after the land is physically possessed and made part of the official “land of Islam”. The above rulings apply to immediately useful land. In contrast, all jurists agreed that conquered wastelands may only be owned through reclamation.<sup>1</sup>

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<sup>1</sup> Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.3, p.128), Al-Dabbūsī's *Ta'sīs Al-Nazar* (p.57), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.234), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.241), 'Ibn Rajab (1st edition (Ḥanbalī), pp.189,411 onwards), 'Ibn Qudāmah (, vol.8, p.422), Al-Ḥusaynī Al-ʿĀmilī ((Shī'ah 'Imāmiyyah), vol., p.7), 'Ibn Al-Murtaḍā (1st edition (Shī'ah Zaydiyyah), vol.2, p.215).



However, jurists differed in opinion regarding the division of ownership of such lands once they are seized:

- Most of the companions of the Prophet (pbuh), the Shāfi'īs, and the Zāhirīs ruled<sup>2</sup> that ownership of such lands are transferred to Muslims in the same manner as other spoils of war. Thus, a fifth must be distributed according to the verse: “And know that out of all the booty that you may acquire in war, a fifth share is assigned to Allāh and his Messenger . . .” [8:41], and the other four-fifths belong to the booty-winners. However, if the booty-winners agree to leave the land with or without compensation, then the ruler may establish them as public mortmain to benefit Muslims.
- The majority of Mālikīs and the 'Imāmīs ruled<sup>3</sup> that such lands automatically become established as public mortmains for Muslims upon being seized, without need for political orders. Thus, the land does not become private property for anyone, and their output is to be spent on Muslim armies as well as infrastructure, religious buildings, and other good sources. However, if the ruler feels that social benefit dictates dividing such captured lands, then he may do so.
- The Ḥanbalīs ruled according to the preferred reported opinion of 'Aḥmad<sup>4</sup> that the ruler may decide whether to divide the land or to establish it as a mortmain. If he divides it, then the new owners must pay a permanent annual *kharāj* or tax similar to rent. Thus, the land may be subject to the *kharāj* tax, which is permanently levied on the land, and payable by whoever exploits it in any given year.
- The Ḥanafīs and Zaydīs ruled<sup>5</sup> that the ruler has the option of dividing the land among Muslims (as the Prophet (pbuh) did in Kḥaybar, or to acknowledge its existing owners, who are thus subjected both to the *jizyah* tax for non-Muslims, as well as the *kharāj* tax on the land. In this regard, 'Ibn 'Abidīn ruled that it is preferable to distribute the land if the Muslims need it, and preferable to leave it with its existing owners if the land is not needed, so that it may be available for Muslims at a later time of need.

<sup>2</sup>Al-Shāfi'ī (, vol.4, pp.103,192), Al-Nawawī's *Makḥṭūṭ Al-Rawḍah* (vol.2, #24b), 'Ibn Ḥazm (, vol.7, p.241).

<sup>3</sup>Al-Kḥarshī (1317H, 1st and 2nd editions (Mālikī), vol.3, p.128), *Al-Mudawwanah* (vol.3, p.27), Al-Ḥaṭṭāb (1st edition (Mālikī), vol.3, p.336), 'Ibn Juzayy ((Mālikī), p.148), Al-Kulīniy ((Shī'ah 'Imāmiyyah), vol.1, p.626), Al-Husaynī Al-ʿĀmilī ((Shī'ah 'Imāmiyyah), vol.4, p.239 onwards), *Al-Sharḥ Al-Raḍawī* (p.310), *Al-Rawḍah Al-Bahiyyah* (vol.1, p.222), *Al-Mukhtaṣar Al-Nāfiʿ fī Fiqh Al-'Imāmiyyah* (p.138).

<sup>4</sup>*Zād Al-Maʿād* (vol.2, p.173), Al-Maqdisī's *Al-Sharḥ Al-Kabīr* (vol.1, p.538), *Al-Muḥarrar* (vol.2, p.178), *'Aḥkām 'Ahl Al-Dhimmah* by 'Ibn Al-Qayyim (p.102).

<sup>5</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.10, pp.15, 37], Kḥusrū (1304H (Ḥanafī), vol.1, p.285), 'Ibn Al-Humām ((Ḥanafī), vol.4, p.303), 'Ibn 'Abidīn ((Ḥanafī), vol.3, pp.31,353), 'Ibn Al-Murtaḍā (1st edition (Shī'ah Zaydiyyah), vol.2, p.912).



## Proofs

It is clear thus that jurists agree on the permissibility of dividing spoils of war among the winners, based on the generality of the verse: “And know that out of all the booty that you may acquire in war, a fifth share is assigned to Allāh and his Messenger, and to near relatives, orphans, the needy, and the wayfarer . . .” [8:41]. Thus, one-fifths of the spoils of war are specified to those mentioned in the verse, or to the state. All jurists then agree that the remaining four-fifths, by implication, go to those who captured the booty, since Allāh (swt) referred to the booty as said: “what you acquired in war” [8:41].

There is further proof in the actions and sayings of the Prophet (pbuh). In this regard, it is narrated that he (pbuh) said: “If you dwell in a village, then you should take a stake therein; but if a village disobeys Allāh and messenger, then one-fifth of its property belongs to Allāh and his messenger, and the rest is yours”.<sup>6</sup> The first village mentioned in the Ḥadīth refers to booty captured without fighting, while the latter refers to that which is captured by force.

The Prophet’s (pbuh) actions also support this opinion, since it is established that he divided Kḥaybar between the winners of booty after it was captured by force. It is also established, as ‘Ibn Al-Qayyim said in *Zād Al-Ma‘ād* that he divided the properties of Banū Qurayzah and Banū Al-Naḍir.<sup>7</sup> In contrast, Madīnah was conquered by Qur’ān, and thus its people reverted to Islam and their property rights were protected. Finally, Makkah was conquered by force, but the Prophet (pbuh) did not divide its property among the Muslims. Thus, we have examples of all three types of behavior in the Sunnah of the Prophet (pbuh).

In this regard, ‘Umar ibn Al-Khaṭṭāb (mAbpwh) said: “I swear by the One who holds my soul in his hand, that were I not afraid that the wealth of Muslims will become distributed too unequally, I would divide the booty of every village among the fighters as the Prophet (pbuh) did in Kḥaybar.<sup>8</sup> Instead, I left it as a treasure for all Muslims, so that they may divide it among them fairly”.<sup>9</sup> Thus, ‘Umar chose not to divide the captured lands.

## Is the ruler bound to divide the land?

Jurists differed in opinion regarding whether or not the ruler is bound to divide the land among the winning Muslim fighters, like other booty:

- The Shāfi‘īs and the Zāhirīs ruled that lands should be divided like other booty. They ruled thus that there is no difference between movable and immovable captured property in the application of the Qur’anic verse [8:41],

<sup>6</sup>Narrated by ‘Aḥmad, Muslim, and ‘Abū Dāwūd, c.f. Al-Nawawī’s *Sharḥ Muslim* (vol.1, p.69), ‘Abū ‘Ubayd’s *Al-‘Amwāl* (p.57).

<sup>7</sup>*Sharḥ Muslim* (vol.12, pp.91,164), *‘Aynī Bukḥārī* (vol.15, p.46), ‘Abū Dāwūd’s *Sunan* (vol.3, p.217), *Zād Al-Ma‘ād* (vol.2, p.68), Al-Shawkānī (, vol.8, p.12).

<sup>8</sup>Meaning, if some get spoils of war and others don’t, thus leading to gross inequality of wealth; c.f. *Fath Al-Bārī* (vol.7, p.395), ‘Ibn Al-‘Athīr’s *Al-Nihāyah* (vol.1, p.69).

<sup>9</sup>Al-Bukḥārī’s *Ṣaḥīḥ* (vol.4, p.86).



and the Sunnah of the Prophet (pbuh), who divided the booty.<sup>10</sup> In this regard, they ruled that the verse “What Allāh has bestowed on His messenger and taken away from them . . .” [59:6] apparently refers to properties that Muslims captured without fighting.

They further ruled that if the ruler chooses not to distribute the land among the winner fighters, then he should compensate them otherwise as the Prophet (pbuh) did on the days of Ḥunayn, Khaybar, and Banū Qurayzah.<sup>11</sup> This prescription is also similar to the action of ʿUmar (mAbpwh), who compensated the warriors in the conquest of Iraq, when he established the conquered land as a public mortmain. This ruling follows from the fact that winning fighters are entitled to four-fifths of the booty, and the ruler does not have the authority to void those rights for immovable or movable property. Thus, if any of the fighters is not satisfied with his compensation, he is entitled to his share in the land.<sup>12</sup>

- The majority of the Mālikīs, and the ʿImāmīs ruled<sup>13</sup> that captured land becomes a mortmain as soon as it is seized, without need for an administrative decision or compensation for the fighters. They provided as proof of their opinion the fact that ʿUmar established the conquered lands of Egypt, the Levant, and Iraq as mortmains.
- The Ḥanafīs and Ḥanbalīs ruled that the ruler has the option of dividing the land or establishing it as a mortmain. Thus, they argued that ʿUmar exercised his right and chose to make it a mortmain, whereby it is owned by the Muslims at large (as represented by the state), with its usufruct alone being owned by those given control over it at any time.

### Proofs of the option to establish land as a mortmain

The latter actions of ʿUmar, and the juristic opinion based on those actions, are based on the following juristic proofs:

1. The verses [8:41] on spoils of war captured by force, and [59:6] on lands captured without force, apply to the same topic. In this regard, the latter verse restricts the ruling of the first to all properties other than land. With regards to land, the second verse gave the ruler a choice to divide it or establish it as a mortmain, whichever he deems to be most beneficial for Muslims. In this manner, one can combine the rulings of both verses, the first of which dictates giving one-fifths to the state, while the second dictates dividing among all Muslims without a one-fifths share for the

<sup>10</sup>ʿIbn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.388), Al-Haythamī (, vol.5, p.340).

<sup>11</sup>Narrated by Al-Bukhārī, Al-Bayhaqī, and others, c.f. Al-Bayhaqī’s *Sunan* (vol.9, pp.74,136), *Al-Bidāyah wa Al-Nihāyah* (vol.4, p.352).

<sup>12</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.234), Al-ʿImām Al-Nawawī/Al-Subkī ((Shāfiʿī), vol.1,p.274).

<sup>13</sup>Al-Ḥaṭṭāb (1st edition (Mālikī), vol.3, p.366), Muḥammad ʿElīsh (1294H (Mālikī), vol.1, p.735), ʿIbn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.387), ʿIbn Juzayy ((Mālikī), p.148), Al-Ḥusaynī Al-ʿĀmilī ((Shīʿah ʿImāmiyyah), vol.7, p.6).



state.<sup>14</sup> In this regard, most Islamic legal theorists prefer combining the rulings in two verses to claiming that the latter one abrogates the first, as some jurists have argued.<sup>15</sup>

In this regard, the Prophet (pbuh) implemented the ruling in [8:41], while ‘Umar (mAbpwh) implemented the ruling in [59:6], and the Prophet’s (pbuh) action thus did not negate the validity of ‘Umar’s. In this regard, the Prophet’s (pbuh) action was either meant to make the act permissible, or to make the option that faced ‘Umar an obligatory one. In this regard, ‘Umar used both verses to infer what his obligation was at the time.<sup>16</sup> In this regard, ‘Umar said that the verse [59:6] applies to all people to the day of judgment.<sup>17</sup> He also said: “I swear by Allāh that every Muslim has a right to this property, including shepherds in Aden”.<sup>18</sup>

Thus, the verse [59:6] is understood to give all Muslims, including one’s who were not yet born at conquest time, in their rights to the land. Since those rights would be lost if the land is divided among the fighters, the Mālikīs argued that this is the basis for establishing the land as a mortmain. In this regard, it must be noted that this is not the type of mortmain that makes the land ineligible for sale. Indeed, such sales are permissible, and have been observed in the history of Islam. Moreover, jurists have agreed that such captured lands can be inherited, while mortmains cannot be inherited. Those are two among many differences between this type of public mortmain and other more traditional mortmains.<sup>19</sup>

2. The Prophet (pbuh) left some villages without distributing its lands, and he (pbuh) did not distribute the properties of Makkah even though he captured it by force.<sup>20</sup> He also captured many other Arab lands, including Banū Qurayẓah and Banū Al-Naḍīr, but only distributed the land of Khaybar. Thus, the Prophet (pbuh) established a Sunnah both for dividing the land and for not dividing it, giving later rulers the option to follow the one action or the other.<sup>21</sup>
3. The companions of the Prophet (pbuh) approved of ‘Umar’s choice to leave the conquered land of Iraq in the possession of its owners, charging them

<sup>14</sup>The majority of jurists disagreed with the Shāfi‘īs and Zaydīs, and ruled that there is no one-fifths share for the state in land captured without force, c.f. ‘Ibn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.321), ‘Ibn Juzayy ((Mālikī), pp.147,150), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.5, p.106), ‘Ibn Al-Murtaḍā (1st edition (Shī‘ah Zaydiyyah), vol.5, p.443).

<sup>15</sup>c.f. ‘Ibn Rushd *Al-Muqaddimāt Al-Mumahhidāt* (vol.1, p.271 onwards).

<sup>16</sup>c.f. *Al-Durrah Al-Yatīmah fī Āl-Ghanīmah*, manuscript by Al-Shaykh Al-Fizzārī (#102).

<sup>17</sup>Narrated by ‘Abū Dāwūd, c.f. his *Sunan* (vol.3, p.195), see also Al-Qaṣṭallānī (vol.5, p.201).

<sup>18</sup>Narrated by ‘Ibn ‘Abī Shaybah and Al-Bayhaqī, c.f. the latter’s *Sunan* (vol.6, p.351).

<sup>19</sup>Al-Bājī Al-‘Andalusī (1st edition (Mālikī), vol.3, p.223 onwards), *Zād Al-Ma‘ād* (vol.2, p.69).

<sup>20</sup>As narrated by Muslim in his *Ṣaḥīḥ*, which is the chosen opinion among jurists, c.f. ‘Ibn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.388).

<sup>21</sup>Al-Qaṣṭallānī’s *Sharḥ Al-Bukhārī* (vol.5, p.202), *Zād Al-Ma‘ād* (vol.2, p.69), ‘Abū Yūsuf’s *Al-Kharāj* (p.68), ‘Ibn Taymiyyah’s *Al-Qiyās* (p.40).



the *jizyah* tax for non-Muslims, and charging their land the 10% land tax for conquered agricultural lands. He (mAbpwh) took those actions in the presence of the Prophet's companions, and gave proof from verse [59:6]. Since none of the companions questioned his reasoning and his actions, that constitutes a consensus (*'ijmā'*) among them on the validity of his choice. In this regard, even the companions who disagreed with 'Umar's choice initially (including Bilāl and Salmān), later accepted that opinion.<sup>22</sup>

4. It is also logical that had captured lands been divided in the early days of Islamic conquests, which lands encompassed most of the known world of that time, what would be left for later Muslims. Such division of land would have left the Muslim treasury too poor to support the needs of Muslims. Thus, 'Umar recited [59:6-7], and then said: "Allāh made all Muslims, including later ones, as partners in such lands. If I were to divide the land among you, there would be none left for later generations of Muslims. However, if I keep the land thus, even a poor shepherd in Sanaa would get his share of this booty in a dignified manner".

'Umar also said in support of his opinion: "Those borders required protection, and those great cities of the Levant, the Arabian subcontinent, Kufa, Basrah, and Egypt require many armies to protect. How could all such armies be financed if the land is distributed here today?". Those present were convinced by his logic, and thus accepted his opinion.<sup>23</sup>

It is also logical that dividing the land among the winning fighters would give them incentive to leave the army and become farmers, thus weakening the Muslim nation. Moreover, the winning Arab fighters have a comparative disadvantage in farming the land relative to those who have been farming it, and who have great expertise in matters of agriculture. Thus, it is more beneficial from the point of economic efficiency to leave the land to be toiled by its experienced owners.

Thus we have provided many proofs from the Qur'ān, the Sunnah, and 'Ijmā' that the ruler has the option to divide captured lands or to leave it with its current owners and charge them a *kharāj* tax. In this regard, both types of captured lands (those captured by force and those captured without it) fall in the same category as far as this option is concerned, and should be decided based on the greater benefit of Muslims, as 'Umar (mAbpwh) did.

### 106.1.2 Abandoned lands

Jurists know this second category of lands, which were captured without force, as *al-fay'*, and it includes all properties taken from non-Muslims without fighting or the threat of war, such as the payments of the *jizyah* tax, and the one-tenths tax

<sup>22</sup>'Abū Yūsuf's *Al-Kharāj* (pp.27,35), *Sharḥ Al-Siyar Al-Kabīr* (vol.3, p.254), Al-Qaṣṭallānī (vol.5, p.200), *Al-'Amwāl* (p.58).

<sup>23</sup>*Sharḥ Al-Siyar Al-Kabīr* (vol.3, p.254), 'Abū Yūsuf's *Al-Kharāj* (p.24 onwards), 'Abū 'Uбайд's *Al-'Amwāl* (p.57), *Futūḥ Al-Buldān* (p.275).



on international commerce.<sup>24</sup> The legal status of such properties is transfer of ownership to the Muslim treasury upon being seized, which the jurists expressed in terms of establishing the land as a public mortmain for Muslims. The political ruler must thus make such lands subject to the *kharāj* tax on its output, which is tantamount to a rental to be paid by whoever farms the land, be he a Muslim or covenantor.

This land was established as a mortmain automatically since it is not technically classified as spoils of war (*ghanimah*) that are captured by force or the threat of force. Thus, they are subject to the verse [59:6] regarding *fay'*, and it is considered the property of all Muslims. All jurists agree on this ruling for immovable properties captured without fighting. The Shāfi'is and Ḥanbalis said that an order from the ruler was still required to establish such captured lands as a public mortmain, but the majority of jurists did not even require that order for its establishment.<sup>25</sup>

The majority of jurists ruled similarly for movable property captured without force, that the ruler has the option of dividing the booty or establishing it as a public mortmain. This majority opinion seems to be more valid than the Shāfi'ī opinion stated below. They provided as proof the narration of 'Anas ibn Mālik that 'Umar said: "The properties of Banū Al-Naḍir were among those captured without fighting, and the Prophet (pbuh) dealt with them personally, supporting his family for a year, and using the rest to support the army."<sup>26</sup> This statement clarifies that booty captured without force was not subject to the one-fifth rule. In this regard, the verses [59:6], [59:7] clearly stipulate that booty captured without force (*fay'*) is not distributed in the same manner as that captured with force (*ghanimah*), as it is well known that the property of Banū Al-Naḍir was put under the exclusive control of the Prophet (pbuh).<sup>27</sup> Further proof is provided by the fact that the verse [59:7] further clarifies the ruling by stating "so that it will not be merely a circuit between the rich among you".

In contrast, the Shāfi'is ruled that such movable *fay'* must be treated the same as booty captured by force (*ghanimah*), thus giving one-fifths to the state and distributing the remaining four-fifths. They based this ruling on the view that the verse [59:6] dealing with booty captured without force is general, while the verse [8:41] dealing with booty captured by force is specific. Thus, the two rulings may be reconciled by restricting the general whenever appropriate.<sup>28</sup>

<sup>24</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.389), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.247), Al-Ramlī ((Shāfi'ī), vol.5, p.105), 'Ibn Al-Qayyim's *Aḥkām 'Ahl Al-Dhimmah* (p.106).

<sup>25</sup>'Ibn Al-Humām ((Ḥanafī), vol.4, p.353), *Al-Kharāj* (p.23), Al-Dardīr ((Mālikī)A, vol.2, p.175), 'Ibn Juzayy ((Mālikī), p.66), Al-Māwardī ((Shāfi'ī), p.133), 'Abū Ya'la ((Ḥanbalī), p.132), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.3, p.99), Al-Maqdisī's *Al-Sharḥ Al-Kabīr* (vol.10, p.542), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.75), 'Abu Al-Barakāt ((Ḥanbalī), vol.2, p.179).

<sup>26</sup>*Sharḥ Muslim* (vol.12, p.70). Al-Nawawī said that this statement referred to most of the properties of Banū Al-Naḍir.

<sup>27</sup>'Ibn Hishām's *Sīrah* (vol.2, p.337).

<sup>28</sup>*Zād Al-Ma'ād* (vol.3, p.220), 'Ibn Juzayy ((Mālikī), p.148), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.3, p.93).



According to the more correct majority opinion, thus, the ruler has the option of distributing booty captured without force or establishing it as a mortmain. In this regard, the ruler must keep special bookkeeping records of booty thus captured, so that Muslims may be paid from its proceeds monthly or otherwise.<sup>29</sup>

### 106.1.3 Lands captured by treaty

The treaty according to which lands are acquired by Muslims determine the legal status of such lands. In particular, the contract may specify that the land becomes property of Muslims, or it may specify that the existing owners of the land keep it (as was the case in Yemen and Al-ḥīrah).

If the contract renders the land property of Muslims, then it should become a public mortmain for Muslims, in analogy to land captured by force and inducted thus into the land of Islam. This ruling is based on the tradition that the Prophet (pbuh) conquered Khaybar and agreed with its people that they should toil the land in exchange for half of its output, implying that the land thus became property of the Muslims. In this regard, 'Ibn 'Umar (mAbpwt) said: "The Prophet (pbuh) settled with the people of Khaybar that they would get half of the agricultural produce of the land they toil".<sup>30</sup> It is also narrated that the Prophet (pbuh) agreed with Banū Al-Naḍīr (who were conquered without fighting) that they would leave Madīnah, and take with them all their camels and movable properties with the exception of weapons.

Such lands must thus be made subject to the *kharāj* tax. This tax is thus permanently attached to the land, so that even if a Muslim were to buy it, he must still pay that *kharāj*. All jurists agree on this ruling, viewing the *kharāj* tax as a form of paying rent for the land to the Muslim treasury.<sup>31</sup>

In the second case, where the contract specifies that the owners of the land may keep it, jurists agree that Muslims must be bound by those terms of contract. In this case, the original owners of the land may keep it, but the land is still subject to the *kharāj* tax, to be paid to the Muslim treasury.<sup>32</sup>

<sup>29</sup> 'Ibn Al-Murtadā (1st edition (Shī'ah Zaydiyyah), vol.5, p.442), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.248).

<sup>30</sup> Narrated by Al-Bukhārī, Al-Bayhaqī and 'Abū Dāwūd, c.f. Al-Bukhārī's *Ṣaḥīḥ* (vol.1, p.105; vol.5, p.140), Al-Bayhaqī's *Sunan* (vol.6, p.113), and 'Abū Dāwūd's *Sunan* (vol.3, p.357).

<sup>31</sup> *Al-Mudawwanah* (vol.3, p.219), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.3, p.219), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.3, p.149), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.75), 'Abū Al-Barakāt ((Ḥanbalī), vol.2, p.179), 'Aḥkām 'Ahl Al-Dhimmah (p.106), Al-Ḥusaynī Al-'Āmilī ((Shī'ah 'Imāmiyyah), vol.4, p.249), Al-Ḥillī ((Shī'ah 'Imāmiyyah), p.114).

<sup>32</sup> *Al-Kharāj* (p.63), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.3, p.274), 'Ibn 'Ābidīn ((Ḥanafī), vol.2, p.53), Al-Dardīr ((Mālikī)A, vol.2, p.175), 'Ibn Juzayy ((Mālikī), p.148), Al-Shāfi'ī (, vol.4, pp.103,193), Al-Maqdisī's *Al-Sharḥ Al-Kabīr* (vol.10, p.543), 'Aḥkām 'Ahl Al-Dhimmah (p.105), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.1, p.467). Note that those Ḥanbalī references specify that the *kharāj* thus belongs to Muslims. However, Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.686) states that there is no *kharāj* on lands that were specified in a treaty to belong to its original owners (e.g. those of Yemen and Ḥiyarah), and there is no *kharāj* on land reclaimed by Muslims, such as the land of Baṣrah.



The majority of jurists, and the 'Imāmī Shī'īs ruled in this case that *kharāj* is tantamount to a *jizyah* or tax on non-Muslims. Thus, they ruled that if they revert to Islam, that tax must be dropped, based on the order of 'Umar ibn 'Abdul-'Azīz that no *kharāj* will be collected on locals who convert to Islam.<sup>33</sup> In contrast, the Ḥanafīs and Zaydīs ruled that *kharāj* in this case is a type of penalty, which may not be exercised on a Muslim at its inception, but which may remain in place if its subject was initially non-Muslim.<sup>34</sup>

The Shāfi'īs and some Ḥanbalīs consider the lands of those subject to a treaty to keep their land a "land of treaty".<sup>35</sup> In contrast, the majority of jurists that such lands are considered "lands of Islam", and its non-Muslim inhabitants must thus be considered 'Ahl Al-Dhimmah, and subjected to the *jizyah* tax for non-Muslims dwelling in Muslim lands.

## 106.2 Lands within the Islamic state

There are four types of land, according to whether or not the land is owned, and whether or not the land is useful (e.g., in agriculture or dwelling if owned, grazing or tree-cutting if ownerless). We shall give a general summary of the legal rulings of the different types of land in the remainder of this chapter.

### 106.2.1 Owned useful land

Such lands are protected by the owner's property rights. Thus, nobody is allowed to use such land or deal in it thereof without its owner's permission.

### 106.2.2 Owned wasteland

If owned land loses all access to water, its ownership still remains intact regardless of the length of period that passes without its use. Thus, if the owner is known, has the right to sell it, give it as a gift, leasing it, bequeathing it, etc. If the owner of such land is unknown, then it is treated like found land the property status of which is unknown (*al-luqatah*).

Grazing grass that grows in any owned land is accessible to all people, unless the landowner cut it from the ground. This ruling is based on the aforementioned Ḥadīth specifying that all men are partners in fire, grass, and water.<sup>36</sup> Thus, if

<sup>33</sup> *Lubāb Al-Lubāb* (p.73), Al-Bayhaqī's *Sunan* (vol.9, p.141), 'Abu Al-Barakāt ((Ḥanbalī), vol.2, p.179), Al-Ḥusaynī Al-'Āmilī ((Shī'ah 'Imāmiyyah), vol.4, p.239), Al-Ḥillī ((Shī'ah 'Imāmiyyah), p.114).

<sup>34</sup> *Al-Talwīḥ 'Alā Al-Tawdīḥ* (vol.2, p.152), *Al-Muntaza' Al-Mukhtār* (vol.1, p.575).

<sup>35</sup> Al-Māwardī ((Shāfi'ī), p.133), 'Abū Ya'cālā ((Ḥanbalī), p.133), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.75).

<sup>36</sup> Narrated by 'Aḥmad and 'Abū Dāwūd on the authority of some of the Prophet's (pbuh) companions. It was also narrated by 'Ibn Mājah on the authority of 'Ibn 'Abbās whose narration also stated that the price for those goods is forbidden. It was also narrated by al-Al-Ṭabarānī in his *Mu'jam* on the authority of 'Ibn 'Umar, and also narrated by others, c.f. Al-Samarqandī ((Ḥanafī), vol.3, p.430), Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.294), Al-Ṣan'ānī (2nd printing, vol.3, p.86).



the landowner cuts grass and stores it, it becomes his, in analogy to the ruling for bottled water and other accessible properties possessed in containers. This follows from the other previously mentioned Ḥadīth: “Whoever takes accessible property that was not taken by any other Muslim thus owns what he took”.<sup>37</sup>

Ownerless pastures, gardens, and forests have the same legal status as grass. Other accessible goods such as fish in the sea and birds in the sky also inherit the same legal rulings.

In contrast, wood and reeds in owned land are not deemed accessible without the landowner’s permission. This follows from the view that people may buy forest-lands for the sole reason of owning the wood and reeds therein. However, it is assumed that land is never assumed to be bought for the sole reason of owning the grass therein, since such land would normally be bought for agricultural purposes.<sup>38</sup> As an exception to the above ruling, jurists stipulated that if the owner of a land purposefully grew grass and watered it, then it becomes his private property.

### 106.2.3 Used and unused wastelands

We have seen that some wastelands are used for grazing and wood-cutting, cemeteries, etc. inside the city, or nearby. Such lands are not considered wasteland in the sense of “dead”, and its neighboring users are considered to have a right to that land. Thus, the ruler is not authorized to give that land to anyone, lest he thus hurt its users. On the other hand, those users do not have the right to exclude others from its use, since it is not technically their property. Uses for such lands within the city or nearby may also include using them as a source of salt, tar, crude oil, and other useful materials. The demarcation for lands that are considered nearby and those considered faraway is determined by the farthest distance that can be reached by voice.

We have also seen that jurists consider land “wasteland” in the sense of “dead” if they are ownerless lands not near a city or village, are not being used due to having very little or too much water. ‘Abū Yūsuf applied the distance demarcation in the previous paragraph for determining if the land is far from cities and villages, but the Ḥanafis ruled according to the majority view that distance is immaterial in this case, where the land is not used and not owned by a Muslim or *Dhimmī*. On the other hand, owned properties are not considered dead, and those whose owner are considered found (*luqatah*), and given to the ruler to deal with as he sees fit.

Reclamation of such wasteland may be accomplished by building on it, planting in it, digging a well, etc., so that it can be of use.<sup>39</sup> Wasteland may only be owned by reclamation, and may not simply be owned by building fences or

<sup>37</sup>Narrated by ‘Abū Dāwūd on the authority of Samurah ibn Muḍarras, and deemed valid by Al-Ḍiyā’ in *Al-Mukhtārah*. Al-Baghawī said that this is the only Ḥadīth for which he is familiar with this chain of narrators, c.f. Al-Shawkānī (, vol.5, p.302 onwards).

<sup>38</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.192 onwards).

<sup>39</sup>Al-Kāsānī ((Ḥanafī), ibid., p.194), ‘Ibn Al-Humām ((Ḥanafī), vol.8, p.136 onwards), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.306).



marking it otherwise. However, jurists agreed that by marking land thus, a person may have priority for that land over others.<sup>40</sup> This ruling is based on the above mentioned Ḥadīth that whoever takes a property that was not previously taken by a Muslim becomes its owner, as well as a similar Ḥadīth that states that the pilgrimage lands of Minā may be taken for dwelling on a first-come first-served basis.<sup>41</sup>

However, if a man marks a land for three years without reclaiming it, then the ruler may take it and give it to another. In this regard, marking the land is just a demarcation of its limits, but ownership can only be justified by actual reclamation. The three year grace period given to a potential land reclamer is based on a statement of ʿUmar to that effect.<sup>42</sup> Clearly, such a grace period is needed since land cannot be reclaimed overnight.

### Official permissions for land reclamation

Jurists differed in their opinions regarding the need for official permission to reclaim land. Thus:

- ʿAbū Ḥanīfa and the Mālikīs ruled<sup>43</sup> that an official permission from the ruler or his deputy is required for land reclamation. They based this ruling on the Ḥadīth: “No person is permitted to take something without his ruler’s approval”.<sup>44</sup> Thus, if the ruler does not give his permission, the land reclamer does not acquire ownership.
- ʿAbū Yūsuf, Muḥammad, the Shāfiʿīs, and the Ḥanbalīs ruled<sup>45</sup> that land may be owned upon its reclamation, with or without the ruler’s permission. They based this ruling on the Ḥadīth: “Whoever reclaims land, it becomes his; and a transgressor’s sweat does not grant him any right”.<sup>46</sup>

<sup>40</sup>Ibn Al-Humām ((Ḥanafī), *ibid.*, p.138), Al-Kāsānī ((Ḥanafī), *ibid.*, p.195), ʿIbn ʿĀbidīn ((Ḥanafī), *ibid.*, p.307), Al-Dardīr ((Mālikī)A, vol.4, p.70), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.377), ʿIbn Qudāmāh (, vol.5, pp.518,538), ʿAbū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.425).

<sup>41</sup>Narrated by ʿAḥmad, as well as ʿAbū Dāwūd, Al-Tirmidhī, ʿIbn Mājah, and Al-Bayhaqī in the their *Sunan* on the authority of ʿAʿīsha (mAbpwh). It was deemed a good Ḥadīth by Al-Tirmidhī, c.f. *Takhrīj ʿAḥādīth Tuḥfat Al-Fuqahāʾ* by Dr. Al-Zuḥaylī and Al-Muntaṣir Al-Kittānī (vol.3, p.442), Al-Shawkānī (, vol.8, p.22).

<sup>42</sup>Narrated in ʿAbū Yūsuf’s *Al-Kharāj* on the authority of Saʿīd ibn Al-Musayyib (p.65), c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.290).

<sup>43</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.194), ʿIbn Al-Humām ((Ḥanafī), vol.8, p.136), ʿIbn ʿĀbidīn ((Ḥanafī), vol.5, p.309), Al-Dardīr ((Mālikī)A, vol.4, p.69).

<sup>44</sup>Narrated by Al-Ṭabarānī on the authority of Muʿādh ibn Jabal. However, its chain of narration is weak, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.3, p.430; vol.4, p.290).

<sup>45</sup>c.f. the previously cited Ḥanafī sources, as well as Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.361), ʿIbn Qudāmāh (, vol.5, p.513 onwards).

<sup>46</sup>Narrated on the authority of eight authorities: ʿAʿīsha, Saʿīd ibn Zayd, Jābir, ʿAbdullāh ibn ʿAmr ibn Al-ʿĀs, Fuḍālah ibn ʿUbayd, Marwān ibn Al-Ḥakam, ʿAmr ibn ʿAwf, and ʿIbn ʿAbbās. Al-Bukhārī and others narrated the version on the authority of ʿAʿīsha (mAbpwh), c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.288), Al-Ṣanʿānī (2nd printing, vol.3, p.83).



### Inviolable areas for wells and rivers

Jurists are in agreement that wells and rivers have inviolable surrounding areas forbidden for others to use or reclaim. In this regard, the Ḥanafis agreed that the inviolable land surrounding a water spring is five-hundred cubits, based on the Ḥadīth: “A water spring has a five-hundred cubits’ inviolable area, and that area for a well in a camel dwelling area, whose water is accessible by hand, is forty cubits”.<sup>47</sup>

On the other hand, jurists differed in opinion regarding the inviolable area surrounding wells and rivers. Thus:

- The Ḥanafī ruled that wells in animal-dwelling areas, whose water is accessible by hand, have an inviolable perimeter of forty cubits. They based this ruling on the Ḥadīth: “Whoever digs a well has a right to an inviolable area of forty-cubits for his animals to kneel down”.<sup>48</sup>
- ‘Abū Ḥanīfa also ruled that the same forty cubit rule applies to wells whose water can only be accessed by using the workforce of animals. He based this ruling on the generality of the above mentioned Ḥadīth.
- ‘Abū Yūsuf and Muḥammad ruled that the inviolable perimeter for wells whose water require the workforce of animals is sixty cubits, in accordance with the continuation of the above-mentioned Ḥadīth, which distinguished between the two types of wells (*al-‘aṭan* and *al-nāḍiḥ*), and specified the forty-sixty rule, respectively. They also reasoned that the longer distance may be necessary to give the working animals distance to walk when pulling water up from the well.
- ‘Abū Yūsuf and Muḥammad differed in their estimation of the inviolable perimeter of a river. Muḥammad ruled that the perimeter should be the same as the width of the river-bed, on each of its sides. ‘Abū Yūsuf, on the other hand, ruled that it should be on-half of the river-bed width on each side. The opinion of ‘Abū Yūsuf in this regard is the accepted one among the Ḥanafis.<sup>49</sup>
- The Mālikīs ruled that the inviolable boundary of any well is the area that may affect its water, or a sufficient area for drinking and kneeling

<sup>47</sup>Al-Zayla‘ī said that this is a strange Ḥadīth, and that the first part of it was added by Al-Zuhārī, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.292).

<sup>48</sup>Narrated by ‘Ibn Mājah and Al-Ṭabarānī on the authority of ‘Abdullāh ibn Muḥaffal. ‘Ibn Ḥajar said that its chain of narrators is weak, since it includes ‘Ismā‘īl ibn ‘Aslam. It was also narrated by ‘Aḥmad in his *Musnad* on the authority of ‘Abū Hurayrah as follows: “The inviolable perimeter of a well is forty-cubits on all sides, for camels and sheep to sit, and for travelers and those seeking to drink from it. The excess water of such wells may not be forbidden others to prevent grass from growing”, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.291 onwards), Al-Ṣan‘ānī (2nd printing, vol.3, p.85).

<sup>49</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.195), ‘Ibn Al-Humām ((Ḥanafī), vol.8, p.139 onwards), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.308 onwards).



down in the case of wells used for animal and human drinking, whichever is larger.<sup>50</sup>

- The Shāfi'is ruled that the inviolable boundary of a well dug in deal land is whatever area is sufficient for a person to stand to take water, or for work animals to walk if they are needed to pull the water up for irrigation.
- The Shāfi'is ruled that the inviolable boundary of a river is the extent to which its silt is deposited, which is determined by local convention.<sup>51</sup> They based this ruling on the above mentioned Ḥadīth, as well as an incompletely transmitted Ḥadīth on the authority of Sa'īd ibn Al-Musayyib: "The inviolable boundary of a new well is twenty five cubits, that of an old well is fifty cubits, and that of wells for irrigation is three-hundred cubits".<sup>52</sup>
- Finally the Ḥanbalīs ruled on the basis of the last mentioned Ḥadīth that the inviolable boundary of a new well is twenty-five cubits, and that of an old well is fifty.<sup>53</sup>

It is forbidden to use the inviolable perimeter of a river or well, etc. Thus, the owner may prevent others from using that land. Moreover, if a person were to dig a well in the inviolable perimeter of the river, well, or spring of another, the latter may cover it up and seek compensation for his labor from the transgressor. We shall discuss the inviolable perimeters of springs, wells, and rivers in greater detail in the following chapter on land reclamation.

<sup>50</sup>Al-Dardīr ((Mālikī)A, vol.4, p.67).

<sup>51</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.424), Al-Khaṭīb Al-Shīrbīnī ((Shāfi'ī), vol.2, p.363).

<sup>52</sup>Narrated by 'Abū Dāwūd in his *Marāsīl* on the authority of Al-Zuhariy and Sa'īd ibn Al-Musayyib. It was also narrated by Al-Dāraqūṭnī and Al-Khallāl with the same two narrators on the authority of 'Abū Hurayrah with a complete chain of narrations. However, the latter narration is weak due to containing 'Ibn 'Abī Ja'far. It was also narrated by 'Aḥmad on the authority of 'Abū Hurayrah, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.292 onwards), *Takhrīj 'Aḥādīth Tudhfat Al-Fuqahā'* (vol.3, p.439).

<sup>53</sup>Ibn Qudāmah (, vol.5, p.540).



## Chapter 107

# Land Reclamation

We shall study this topic in five sections:

1. Definition, legality, and desirability.
2. Land eligible for reclamation.
3. Means of reclamation and enclosure.
4. Conditions of land reclamation.
5. Legal status of reclaimed and inviolable land.

### 107.1 Definition, legality, and desirability

The Arabic term for land reclamation literally means “revival of wasteland” (*‘ihyā’ al-mawāt*). The term legally refers to reclaiming any ownerless and unused land by making it ready for agriculture, or building on it.<sup>1</sup> For the Ḥanafīs, the wasteland that can be reclaimed is any ownerless land, far away from civilization, that has too much or too little water, so that it cannot be used for agriculture, or land that was made useful for agriculture through reclamation efforts.<sup>2</sup> The Shāfi‘īs similarly defined “dead land” eligible for reclamation as that which is not populated or within the inviolable boundaries of populated or used areas.<sup>3</sup>

The most common type of land reclamation involves enclosing a lot of land and making it ready for agriculture, by removing rocks and weeds and making water and fertile soil available, or by building on it. In this regard, the Legislator legalized land reclamation without specifying its means. In such cases, we rely

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<sup>1</sup>Ibn Juzayy ((Mālikī), p.339), Al-Dardīr ((Mālikī)A, vol.4, p.66), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.361), Al-Buhūṭī (3rd printing (Ḥanbalī), vol.4, p.205).

<sup>2</sup>Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.6, p.34), <sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.1, p.218 onwards).

<sup>3</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), ibid.).



on convention to specify the general legalization. In this regard, convention dictates five ways in which land may be reclaimed: (i) clearing the land of plants, (ii) clearing it for agriculture, (iii) fencing, (iv) digging deep ditches, or (v) extracting water.<sup>4</sup>

### 107.1.1 Legality

There are numerous Ḥadīths that legalize land reclamation. Those include: “Whoever revives wasteland owns it thus”,<sup>5</sup> “Whoever revives a wasteland owns it thus, and whoever plants in land under reclamation has no right in it”,<sup>6</sup> “Whoever revives a land that does not belong to anyone becomes most worthy of owning it”,<sup>7</sup> and “Whoever takes what no other Muslim had taken before owns it; following which people quickly went out laying claims to ownerless lots of land”.<sup>8</sup>

Those Ḥadīths clearly establish the permissibility of reviving ownerless and unused lands, allowing for all types of land reclamation mentioned above. ‘Urwah also narrated that ‘Umar ibn Al-Khaṭṭāb and major jurists ruled that the one who reclaims ownerless wasteland owns it thus, although they differed in their conditions for land reclamation.

The Ḥadīths cited above do not only indicate the legality of reclaiming wasteland, but also implies that such land reclamation is desirable. Indeed, land reclamation increases agricultural output, and enhances the economic well-being of all members of society.

## 107.2 Reclaimable Wastelands

Not all lands are eligible for reclamation. We have seen that all jurists agree that ownerless and unused wasteland may be owned by whoever reclaims it. They all agreed as well that any land that has a known owner (who bought it or received it as a gift, etc.) cannot be reclaimed by anyone other than its owner, thus protecting the perpetual rights of landowners.

However, jurists differed over a variety of intermediate cases, as detailed below:<sup>9</sup>

1. Jurists differed in opinion regarding land that was reclaimed and owned

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<sup>4</sup>Al-Ṣan‘ānī (2nd printing, vol.3, p.82).

<sup>5</sup>Narrated by ‘Aḥmad and Al-Tirmidhī, who deemed it good and valid, on the authority of Jābir ibn ‘Abdullāh. It was also narrated by eight different companions of the Prophet (pbuh).

<sup>6</sup>Narrated by ‘Aḥmad, ‘Abū Dāwūd, and Al-Tirmidhī, who deemed it a good Ḥadīth.

<sup>7</sup>Narrated by Mālik in *Al-Muwatta’*, and also narrated by ‘Aḥmad, Al-Bukhārī, and ‘Abū Dāwūd on the authority of ‘A’isha (mAbpwh). ‘Ibn ‘Abdul-Barr deemed it a valid Ḥadīth with a good and complete chain of narrators, which was accepted by the jurists of Madīnah as well as others. ‘Ubayd narrated a similar Ḥadīth on the authority of ‘A’isha in *Al-‘Amwāl*.

<sup>8</sup>Narrated by ‘Abū Dāwūd on the authority of Samurah ibn Muḍarras, c.f. Al-Shawkānī (, vol.5, p.302), Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.288 onwards).

<sup>9</sup>Ibn Qudāmah (, vol.5, p.513), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.206).



thus, and then was left until it died again. For such lands, jurists ruled thus:

- The Shāfi'īs and Ḥanbalīs ruled<sup>10</sup> that such lands cannot be owned through (a second) reclamation. They based this ruling on the fact that all the cited Ḥadīths restrict ownership through reclamation to the case of ownerless land. Thus, they ruled that land that was once owned through reclamation remain the property of their owners in analogy to all other owned properties that were left.
  - the Ḥanafī jurist 'Abū Yūsuf ruled<sup>11</sup> that such lands may be owned through (a second) reclamation, provided that the owner is far away (applying the voice test) and unknown. In contrast, Muḥammad ruled that if land was owned by reclamation under Islamic rule, then it may never be considered wasteland again. Thus, he ruled that if the owner is unknown, the land becomes by default a public property of all Muslims. The accepted opinion among the Ḥanafīs seems to be considering such lands dead and reclaimable if they are far away from towns, as we shall show later.
  - The Mālikīs ruled<sup>12</sup> that wasteland was originally accessible to all, and by being left to die again, it becomes available again for ownership by whoever reclaims it. They also based this ruling on the generality of the Ḥadīth: “whoever reclaims wasteland owns it thus”.
2. Jurists of the four schools ruled that wastelands may be owned by reclamation even if they included ruins of pre-Islamic homes, fortresses, etc. Most Shāfi'īs accepted this ruling based on the view that appropriation of pre-Islamic properties is not forbidden, based on the Ḥadīth: “The properties of past nations belong to Allāh and His messenger, and then they become yours”.<sup>13</sup> On the other hand, there is another reported opinion of 'Imām Al-Shāfi'ī that such lands are not considered dead, and thus may not be owned by reclamation.
  3. The Ḥanafīs, the Mālikīs, and (according to one narration) 'Aḥmad ruled that wastelands that were owned under Islamic rule by an unknown Muslim or protected non-Muslim may be owned by reclamation. They based this ruling on the generality of the Ḥadīths legalizing land reclamation. In this regard, they argued that since the subject of reclamation is wasteland with no known owners, it is sufficiently similar to the case of ownerless wasteland.

<sup>10</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.362), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.423), 'Ibn Qudāmah (, vol.5, p.514), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.206).

<sup>11</sup> Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.219), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.35), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.307).

<sup>12</sup> Al-Dardīr ((Mālikī)A, vol.4, pp.66,68); Al-Dardīr ((Mālikī)B, vol.4, p.87).

<sup>13</sup> Narrated by Sa'īd ibn Manṣūr in his *Sunan* on the authority of Ṭāwūs, and by 'Abū 'Ubayd in *Al-'Amwāl*, c.f. 'Ibn Qudāmah (, *ibid.*).



In contrast, the *Shāfiʿīs* ruled that such land must be considered lost property, and the ruler has the option of keeping it until its owner is found, or selling it and depositing its price as a trust with the Muslim treasury. However, they ruled that such land cannot be owned by reclamation.

The *Ḥanbalīs* also ruled that such lands may not be owned by reclamation. Instead, they consider it analogous to booty captured without use of force (*fayʿ*), which must be designated for public welfare uses.

### 107.2.1 Detailed rulings by school

#### Ḥanafī rulings

The *Ḥanafīs* defined<sup>14</sup> wasteland as ownerless land that is out of inhabited areas, for which no individuals or groups have usage rights. Thus, if the land is inside an inhabited area, or if it is outside that area but commonly used by inhabitants for grazing or wood-collection, etc., 'Abū Ḥanīfa, 'Abū Yūsuf, Muḥammad, and later *Ḥanafīs* agree that the land is not considered dead, regardless of its distance from inhabited areas.

#### Mālikī rulings

The *Mālikīs* defined<sup>15</sup> wasteland as that which is not an inviolable perimeter to lands of common use for grazing, wood collecting, etc., and which was never owned before through reclamation or otherwise, unless it was fallowed until it died once more. In this regard, they did not distinguish between such lands that are near inhabited areas and those that are far away, except to the extent that reclamation of nearby lands require permission from the ruler.

#### Shāfiʿī rulings

The *Shāfiʿīs* ruled<sup>16</sup> that wastelands are those that are not inhabited or useful, or included in the inviolable boundaries thereof, and which were never reclaimed before under Islamic rule. Thus, useful lands and the perimeter needed for their use (e.g. room for animals to roam, etc.) may not be owned by reclamation.

#### Ḥanbalī rulings

The *Ḥanbalīs* defined<sup>17</sup> wastelands as those that are not owned, contain no water and no construction, and which are not used by people. Thus, they

<sup>14c</sup> Abd Al-Ḡhanī Al-Maydānī ((*Ḥanafī*), vol.2, p.219 onwards), Al-Kāsānī ((*Ḥanafī*), vol.6, p.194), Al-Zaylaʿī ((*Ḥanafī Jurisprudence*), vol.6, p.34), 'Ibn ʿĀbidīn ((*Ḥanafī*), vol.5, p.307), 'Ibn Al-Humām ((*Ḥanafī*), vol.8, p.136).

<sup>15</sup> Al-Dardīr ((*Mālikī*)A, vol.4, p.66), Al-Dardīr ((*Mālikī*)B, vol.4, p.87 onwards), 'Ibn Juzayy ((*Mālikī*), p.339).

<sup>16</sup> Al-Khaṭīb Al-Shirbīnī ((*Shāfiʿī*), vol.4, pp.361,363), 'Abū-'Ishāq Al-Shīrāzī ((*Shāfiʿī*), vol.1, p.423).

<sup>17</sup> Al-Buhūtī (3rd printing (*Ḥanbalī*), vol.4, p.205), 'Ibn Qudāmah (, vol.5, p.513 onwards, p.516).



excluded lands neighboring inhabited or useful areas, where the distance designating “neighborhood” is determined by convention.

### 107.3 Means of Reclamation

The Shāfi‘īs said that reclamation or revival of dead or wasteland is determined by local conventions and habits. However, different schools of jurisprudence expressed varying opinions in this regard.

Thus, the Ḥanafīs ruled<sup>18</sup> that land reclamation may take the form of erecting buildings, planting trees or crops, or seeding, turning the soil to ventilate it for agriculture, building dams, digging rivers or other means of irrigation and water containment. However, Muḥammad ruled that if the land reclaimer dug a river without actually irrigating the land, his action is considered to be equivalent only to land enclosure for reclamation, rather than actual reclamation.

The Mālikīs ruled<sup>19</sup> that land reclamation may take one of seven forms:

1. Land will be automatically owned by reclamation if the reclaimer digs a well or water spring, and the well or spring is automatically owned as well.
2. If the land was covered with water (i.e. a swamp), removing the excess water is considered reclamation.
3. Erection of buildings on the land.
4. Planting trees.
5. Tilling the soil and turning it for ventilation.
6. Removal of trees with the intention of possessing the land.
7. Breaking and removing rocks to level the land.

The Shāfi‘īs ruled<sup>20</sup> that the type of land reclamation that leads to ownership varies according to the use intended for the land, which is determined by convention. They based this ruling on the view that the Legal permissibility of land reclamation was general, and thus may be made specific by local convention, which typically indicates the most productive and beneficial use of the land. In this regard, many other general rulings are determined by convention (e.g. receipt of purchased goods and gifts, possession of stolen items, etc.) when the Legal Texts are general in nature. In the area of land reclamation, the main criterion is the intended use to which the land is to be put.

Thus, if the land is to be used for residence, then the land must be enclosed by the customary type of fence, and a building must be erected with at least

<sup>18</sup>Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.6, p.36), ‘Ibn Al-Humām ((Ḥanafī), vol.8, p.139), ‘Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.218).

<sup>19</sup>Al-Dardīr ((Mālikī)B, vol.4, p.93), Al-Dardīr ((Mālikī)A, vol.4, p.69 onwards), ‘Ibn Juzayy ((Mālikī), p.339).

<sup>20</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.4, p.365 onwards), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.424).



part of the building being covered by a roof. The building must also have a door, since that is customary for homes. On the other hand, if the land is to be used for keeping animals, then mere enclosure may be sufficient, and if it is intended for agriculture, then the land must be leveled and arrangements must be made for irrigation, etc.

The Ḥanbalīs ruled<sup>21</sup> that reclamation of land may be established by enclosure with a wall, regardless of the purpose of use. They based this ruling on the Ḥadīth: “Whoever encloses a land with a wall, it becomes his”.<sup>22</sup> They also ruled that land is considered reclaimed if trees are planted therein, or if water is secured for irrigation by digging a well or otherwise. However, the Ḥanbalīs ruled that the mere tilling of the soil or planting of a crop are not sufficient for reclamation, since they are temporary measures unlike planting trees. They also did not consider enclosure by digging a ditch around the land reclamation, in contrast to enclosure by building a wall.

### 107.3.1 Land enclosure

Land may be enclosed by mere demarcation with a series of rocks or other movable objects placed at its boundaries (*al-tahjīr*). Jurists agree that simple demarcation of land is not sufficient to own it by reclamation. However, they also agree that one who encloses land thus has priority to reclaim it over all others.

In this regard, the Ḥanafīs ruled<sup>23</sup> that simple marking of land by rocks does not qualify as reclamation (which requires preparation for agriculture), and thus does not result in ownership. Thus, the enclosed land remains accessible, but the one who enclosed it is given a three year grace period to reclaim it before it is taken from him. The three-year period is based on the saying of ‘Umar: “The one who merely encloses a land with stones has no right in it after three years”.<sup>24</sup> However, the grace period is religious rather than legal. From a legal standpoint, if one person enclosed land and the other reclaimed it within the three years, the reclaimer would own the land rather than the encloser.

The Mālikīs ruled<sup>25</sup> that land enclosure with a line of stones, or allowing one’s sheep to graze therein, does not constitute reclamation. Moreover, they ruled that digging a drinking well for men or animals is not sufficient for reclamation unless the digger claims ownership of the well and the land when he digs it, in which case the land is considered reclaimed and owned.

The Shāfi‘īs and Ḥanbalīs ruled<sup>26</sup> that if a person began reclaiming a land

<sup>21</sup> Ibn Qudāmah (, vol.5, p.538), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.212).

<sup>22</sup> Narrated by ‘Aḥmad and ‘Abū Dāwūd on the authority of Jābir, and also on the authority of Samurah ibn Jundub.

<sup>23</sup> Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.6, p.35), ‘Ibn Al-Humām ((Ḥanafī), vol.8, p.138), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.307).

<sup>24</sup> Narrated by ‘Abū Yūsuf in *Al-Kharāj* on the authority of Sa‘īd ibn Al-Musayyib, but its chain of narrators includes a weak link (Al-Ḥasan ibn ‘Imārah) and a questionable one (Sa‘īd ibn ‘Umar), c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.290).

<sup>25</sup> Al-Dardīr ((Mālikī)A, vol.4, p.70), Al-Dardīr ((Mālikī)B, vol.4, p.93).

<sup>26</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.4, p.366), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1,



but had not finished it, and enclosed it with a line of stones, wooden fence, barbed wires, or a small wall, then he would not own it thus, since that is not considered reclamation. However, he is considered the one with the highest priority to reclaim and own the land, in accordance to the Ḥadīth narrated by 'Abū Dāwūd: "Whoever takes a property before any other Muslim takes it becomes most worthy to own it".

However, if another were to reclaim the land while it was enclosed by the first, the reclaimer would own the land. Moreover, if the encloser does not reclaim the land within three years, the judge must give him an option of reclaiming it or giving others access to do so. If the encloser asks for an extension of the grace period, and he has a valid excuse for seeking that extension, he may thus be given three months or less, as the judge sees fit. However, if he had no valid excuse, then no extension should be granted. Thus, we see that the Ḥanbalī rulings in this case are similar to the Ḥanafī rulings.

## 107.4 Reclamation Conditions

There are three sets of reclamation conditions, pertaining to the reclaimer, the reclaimed land, and the act of reclamation, respectively. In what follows, we shall discuss each set of conditions in some detail.

### 107.4.1 Reclaimer conditions

A reclaimer is defined as someone who reclaims land with the intention of owning it. In this regard, reclamation by whoever owns the property is permissible, since reclamation is similar to hunting in causing ownership.

The Ḥanafīs, Mālikīs, and Ḥanbalīs ruled<sup>27</sup> that the reclaimer of land does not need to be Muslim. Thus, both Muslims and protected non-Muslims (*dhimmīs*) may own wasteland by reclaiming it, as per the general Ḥadīth: "Whoever revives wasteland owns it". In this regard, reclamation is a means of gaining ownership, and Muslims and non-Muslims are equally entitled to acquire property through this as well as other means.

In contrast, the Shāfi'īs stipulated a condition that the reclaimer of land must be Muslim.<sup>28</sup> Thus, they ruled that a protected non-Muslim is not authorized to reclaim wasteland, even if the ruler permits him to do so. They based this ruling on the view that reclaiming land gives the reclaimer a high social status, which is not allowed for protected non-Muslims under Islamic rule. Consequently, they ruled that if a non-Muslim reclaimed land, it may be taken from him without need to compensate him. Moreover, they ruled that if a Muslim takes it from him and revives it, he would thus own it even if the ruler does

p.425), 'Ibn Qudāmah (, vol.5, pp.518,543 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.214).

<sup>27</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.138), Al-Dardīr ((Mālikī)A, vol.4, p.69), 'Ibn Qudāmah (, vol.5, p.517).

<sup>28</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, pp.361-2), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.423 onwards).



not authorize him to do so, since they considered the act of the non-Muslim inconsequential in this case.

### 107.4.2 Reclaimed land conditions

The reclaimed land must satisfy the following conditions related to ownership, usage, and location, respectively:

- The land must not be owned by a Muslim or protected non-Muslim, and must not be attached to any individual. Thus, the jurists said that land eligible for reclamation must be dead from pre-Islamic times, without anyone having owned it in Islamic history. All jurists agree on this condition.<sup>29</sup>
- The land must not be used by residents of nearby or far away inhabited areas, e.g. as grazing lands, room for animal roaming, etc. Most schools of jurisprudence either have unanimity over this condition, or declare it as the majority view, e.g. in the case of the Ḥanafīs.<sup>30</sup>
- The Shāfiʿī stipulated that the reclaimed land must be under the control of Islamic rule, i.e. within “the land of Islam”. However, they ruled that a Muslim may revive lands outside Muslim rule if the authorities controlling it do not prevent Muslims from doing so. However, if the rulers of the land prevent Muslims from owning lands under their control, then Muslims cannot own such lands by seizing them.<sup>31</sup> In contrast, the non-Shāfiʿī jurists did not distinguish between lands under Islamic control and those that are not, arguing that all properties outside Muslim lands may be seized by force, including land.<sup>32</sup>

### 107.4.3 Reclamation conditions

Some jurists stipulated two conditions for the reclamation process:

1. 'Abū Ḥanīfa ruled that reclamation requires a permission from the ruler.<sup>33</sup> He based this ruling on the Ḥadīth: “Nobody is entitled to any property without his ruler’s permission”.<sup>34</sup> He further reasoned that such lands

<sup>29</sup> Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.306), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.219), Al-Dardīr ((Mālikī)A, vol.4, p.66), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.361), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.423), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.205).

<sup>30</sup> Ibn Al-Humām ((Ḥanafī), vol.8, p.136), Al-Kāsānī ((Ḥanafī), vol.6, p.194), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.306 onwards), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), ibid.), Al-Dardīr ((Mālikī)A, vol.4, p.67), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.363), Ibn Qudāmāh (, vol.5, pp.516,525), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.208).

<sup>31</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.362).

<sup>32</sup> Ibn Qudāmāh (, vol.5, p.515), and the previous references.

<sup>33</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.194 onwards), Ibn Al-Humām ((Ḥanafī), vol.8, p.136), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.35), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.307), 'Abū Yūsuf's *Al-Kharāj* (p.64).

<sup>34</sup> Narrated by Al-Ṭabarānī on the authority of Muʿādh, with a weak chain of narration, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.3, p.430; vol.4, p.290).



were originally under non-Muslim control, and thus became *fay'* once they were captured without fighting, and the ruler is responsible for distributing such booty that is captured with or without fighting. This ruling was deemed analogous to the Prophet's declaration: "Whoever kills an enemy owns his weapons and possessions".<sup>35</sup> The latter was an action of the Prophet (pbuh) as a political leader and ruler, not as part of Legislation and Prophecy.

The Mālikīs ruled in this regard<sup>36</sup> that the ruler's permission is required if the land is close to inhabited areas, but not for those far away. The majority of Mālikīs further ruled that a permission to reclaim land may only be issued to a Muslim. They further ruled that non-Muslims are not allowed to reclaim land in the Arabian subcontinent, near Makkah or Madīnah.

'Abū Yūsuf, Muḥammad, the Shāfi'īs, and the Ḥanbalīs ruled<sup>37</sup> that whoever revives a wasteland owns it thus, even without a permission from the ruler. They defended this ruling by saying that there is ample permission in the above cited Ḥadīth from the Prophet (pbuh) and the Law, which supersedes the permission of any ruler. They further reasoned that wasteland is accessible property like dead wood in ownerless land, and ownerless animals that may be hunted. Thus, they argued, whoever captures such property becomes its owner. Finally, the ruler's permission is clearly not stipulated as a condition of the Ḥadīth narrated by Al-Bukhārī on the authority of 'A'isha: "Whoever revives a land that is not owned by anyone is most worthy of owning it". However, they said that it is preferable that the ruler's permission is sought, to avoid unnecessary juristic and legal disputes.

2. The Ḥanafīs limited the grace period for reclaiming an enclosed land (with a line of stones or other fence) to three years, after which the ruler may take the land from him and give it to another. They based this ruling on the view that the purpose of giving him priority for that land is to reclaim it and help Muslims by paying the one-tenths or *kharāj* tax, otherwise allowing him to keep it is of no benefit.<sup>38</sup> We have seen that the three-year rule was derived from the saying of 'Umar (mAbpwh): "The encloser of a wasteland has no right in the land unless he reclaims it within three years".<sup>39</sup>

<sup>35</sup>Narrated by the major narrators of Ḥadīth with the exception of Al-Nasā'ī on the authority of 'Abū Qatādah Al-'Anṣārī, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.3, p.428).

<sup>36</sup>Ibn Juzayy ((Mālikī), p.339), Al-Dardīr ((Mālikī)A, vol.4, p.94).

<sup>37</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.361), 'Ibn Al-Humām ((Ḥanafī), ibid.), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.423), 'Abu Al-Barakāt ((Ḥanbalī), vol.1, p.367), 'Ibn Qudāmah (, vol.5, p.543), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.206).

<sup>38</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.35).

<sup>39</sup>We have seen that the chain of narrators of this tradition is weak. It was also narrated by Al-Nasā'ī in the chapter on properties on the authority of 'Amr ibn Shu'ayb that the Prophet (pbuh) gave some people a share in the land of *Juhaymah*. The recipients of the land left it dead, and it was then taken by others who revived it. Then those who were given the land



Indeed, the three year period is a reasonable period for land reclamation. However, it must be noted that the above is the religious ruling. Legally, if a person reclaims enclosed by un-revived land within the three year period, he would own it and the encloser will not. This is the Ḥanafī ruling, and Shāfiʿī and Ḥanbalī rulings are very similar in this regard.

## 107.5 Consequences of land reclamation

There are four main consequences of land reclamation:

1. Establishment of ownership.
2. Establishment of the one-tenth or the *kharāj* tax.
3. The non-establishment of ownership of the inviolable boundaries of inhabited or used areas.
4. The establishment of ownership for the inviolable boundaries of wasteland.

In what follows, we shall discuss each of those consequences in some detail.

### 107.5.1 Ownership of reclaimed land

The main juristic question with regards to reclaimed land ownership is whether the reclamer only owns the usufruct of the land, or the land itself. In other words: is the ownership total or partial?

The jurist 'Abū Al-Qāsim 'Aḥmad Al-Balkhī said that ownership of reclaimed land is only ownership of usufruct. He compared this ruling through analogy to one who chooses to sit in an accessible area, whereby he has a right to its usufruct, but that right is voided once he stands up.<sup>40</sup>

In contrast, the majority of jurists ruled that land reclamation results in total ownership. They based that ruling on the Ḥadīth: “Whoever reclaims wasteland, it becomes his”. Thus, for the reclamer, the land “becomes his”, and that ownership is not removed if he leaves the land.<sup>41</sup> Consequently, the majority of Ḥanafīs ruled that if a man reclaims some land and then leaves it, and another plants a crop in it, the first owner continues to have priority over the land.<sup>42</sup>

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by the Prophet (pbuh) complained to 'Umar ibn Al-Khaṭṭāb, who said: “Had I, or had 'Abū Bakr, given this land to you, I would not have given it back to you; but it was the Prophet (pbuh) who gave it to you”. He then said: “Whoever has a piece of land and leaves it fallow for three years without reviving it, then if another revives it, the latter becomes more worthy of owning it”, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.290).

<sup>40</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.137).

<sup>41</sup>ibid., Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.35), Al-Kāsānī ((Ḥanafī), vol.6, p.194), Al-Dardīr ((Mālikī)A, vol.4, p.87), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.423 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.261), 'Ibn Qudāmāh (, vol.5, p.513), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.206).

<sup>42</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, p.307), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.137), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.35).



### 107.5.2 The established tax

The state has a right of tax collection on reclaimed land. However, jurists differed whether that tax is the one-tenths tax or the *kharāj* tax. Thus:

- 'Abū Yūsuf ruled that if the land was reclaimed by a Muslim, then it is subject to the one-tenths tax or the *kharāj* tax depending on the type of land (as discussed below).
- Muḥammad ruled that if the land was watered by rain or water from a large river, then it is subject to the one-tenths tax, and if it was watered from a river dug by non-Muslims, then it is subject to the *kharāj* tax. This was the chosen opinion of Al-Mirghyānī (c.f. 'Ibn Al-Humām ((Ḥanafī))).

In this regard, land is generally considered subject to a one-tenths tax if it belongs to one of five categories:

1. Land in the Arabian peninsula.
2. Land whose people reverted to Islam willingly.
3. Land that was conquered by force and divided among the winning Muslim warriors.
4. The land of a Muslim who used it as an orchard or vineyard.
5. Land that was reclaimed by permission from the ruler, which belongs to or is watered by rain, rivers, or springs emanating from one-tenth tax lands.

In contrast, lands traditionally viewed as being subject to the *kharāj* tax are those that fit in one of the following four categories:

1. The Ḥanafīs include in this category all of the fertile land of Iraq, and any other land that was conquered by force and left with its original owners. Such non-Muslim owners are made subject to the *jizyah*, and their land is made subject to the *kharāj* tax, whether or not they become Muslims.
2. Lands conquered by force, and whose owners were replaced by others.
3. Land reclaimed by a Muslim or protected non-Muslim, which is watered from a river dug by non-Muslims.
4. The land of a protected non-Muslim, who made it an orchard.<sup>43</sup>

In contrast, the Ḥanbalīs ruled that no *kharāj* tax is levied on land that was conquered by force, and reclaimed by Muslims (e.g. in Egypt, the Levant, or Iraq). However, if the land was reclaimed by a protected non-Muslim, then it is automatically subjected to the *kharāj* tax.<sup>44</sup>

<sup>43</sup> Al-Samarqandī ((Ḥanafī), vol.1, pp.492-5).

<sup>44</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.195), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.37), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.207).



### 107.5.3 Inviolable boundaries

The inviolable boundaries (*al-ḥarīm*) of an inhabited or utilized area is the area of land needed for its full utilization. Such areas include the area surrounding a well, the front-yard of a house, side-walks, water drainage ducts, grazing areas, trash dumps, etc. Jurists agree that inviolable boundaries of inhabited or utilized lands belong to those lands, and thus may not be reclaimed or owned, to protect the interests of the inhabitants.<sup>45</sup> Similarly, areas that are customarily considered part of the inhabited or utilized area (e.g. roads, sitting areas around markets, etc.) are thus excluded from the category of “wasteland”, and may not be reclaimed.

On the other hand, the one who reclaims a piece of land owns it as well as its inviolable boundaries. Thus, if he built a house, he would own its front yard, if he dug a well he would own its inviolable perimeter, etc. He thus has the right to forbid others from trespassing over this additional property that he acquired by reclaiming his land. In the remainder of this chapter, we shall discuss the legal basis for establishing inviolable boundaries of land, and the size of those boundaries as established in Islamic Law.

#### Legality

Inviolable boundaries are legally based on the fact that the Prophet (pbuh) established inviolable boundaries for water wells.<sup>46</sup> Jurists also agree that water springs have an established inviolable boundary, based on other Ḥadīth that establish inviolable boundaries for different types of land.<sup>47</sup>

Jurists differed slightly in their estimates of the inviolable boundaries of various entities. In what follows, we shall list the estimates according to each of the four Sunni schools. The owner of an inviolable boundary of his property has the right to prevent others from digging in it, and if he does, then he may seek compensation from the transgressor, or he may reverse his actions.

<sup>45</sup> Al-Kāsānī ((Hanafī), vol.6, p.195), Al-Zaylaʿī ((Hanafī Jurisprudence), vol.6, p.36), Al-Dardīr ((Mālikī)A, vol.4, p.67), Al-Dardīr ((Mālikī)B, vol.4, p.88), Al-Khaṭīb Al-Shīrbīnī ((Shāfiʿī), vol.4, p.363), ʿAbū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.423), ʿIbn Qudāmah (, vol.5, p.525), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.208).

<sup>46</sup> The Ḥadīth narrated by ʿAḥmad on the authority of ʿAbū Hurayrah is: “Whoever digs a well, he owns a forty cubits’ perimeter around it, room for his animals to kneel down”, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.291).

<sup>47</sup> ʿAbū Dāwūd narrated in his *Marāsīl* on the authority of Al-Zuhārī on the authority of Saʿīd ibn Al-Musayyib that the Prophet (pbuh) said: “The inviolable boundaries of a normal well is fifty cubits, and that of a new well is twenty-five”. Al-Ḥākim also narrated on the authority of ʿUbādah ibn Al-Ṣāmit that the Prophet (pbuh) established an inviolable boundary for palm trees equal to the span of their branches, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.292 onwards). It is also known that Al-Zuhārī added: “And the inviolable boundary of a water-spring is five-hundred cubits on each side”.



**Ḥanafī boundary estimates**

The Ḥanafīs ruled as follows for the inviolable boundaries of various sources of water and for trees:<sup>48</sup>

1. The majority of Ḥanafīs ruled that the inviolable boundary of a water spring is five-hundred cubits on each side, where a cubit (or arm-length from elbow to finger tips) is equal to six fists, and each fist is equal to the width of four fingers. They based this ruling on Al-Zuharī's report.
2. The Ḥanafīs agree that the inviolable boundary of a well for animal drinking, the water of which is accessible by hand, is forty cubits on all sides, based on some narrations that are not well established.<sup>49</sup> 'Abū Ḥanīfa ruled that the inviolable boundary of a well that requires animal labor to access the water is also forty cubits, while 'Abū Yūsuf and Muḥammad ruled that it is sixty based on a Ḥadīth to that effect. The majority of later Ḥanafīs agreed that the inviolable boundary of a well is determined by utilization needs. They also stipulated that ownership of the inviolable boundary is predicated on the well being dug in wasteland with the ruler's permission, or being dug in the owner's property, otherwise he is not entitled to an inviolable boundary.
3. The Ḥanafīs did not specify a particular size for the inviolable boundary for under-ground water channels. Rather, they specified its inviolable boundary as whatever area is necessary to maintain the channel by throwing accumulated mud, etc. Many opinions exist, including Muḥammad's opinion that a water channel should be given the same size inviolable boundary as a well. Since there is no explicit Legal text in this regard, the size of the inviolable boundary should be left to the consideration of the ruler.
4. The Ḥanafīs differed in opinion regarding the inviolable boundaries of rivers:
  - 'Abū Ḥanīfa ruled that there is no inviolable boundary for rivers that run through the property of another. He based this ruling on the view that the land surrounding a river apparently belongs to the land owner through which the river runs. Thus, the river-owner's claim is not sufficient to establish ownership of that land that is contiguous with and of the same genus as the land-owner's property. In such cases, the ruling is based on the apparent ownership, unless the claimant can provide proof to the contrary.
  - 'Abū Yūsuf and Muḥammad ruled that the owner of such a river still owns inviolable boundaries on both sides, since the river banks are

<sup>48</sup>'Tbn cĀbidīn ((Ḥanafī), vol.5, pp.308-310), 'Tbn Al-Humām ((Ḥanafī), vol.8, p.139 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, pp.36-8), cAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.221 onwards), Al-Kāsānī ((Ḥanafī), vol.6, p.195).

<sup>49</sup>Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.292).



as necessary for the river owner as the inviolable boundaries of wells and springs are for their owners, since river banks are necessary for walking, throwing away silt and mud, etc. However, they differed in their estimate of the size of a river's inviolable boundary. Thus, 'Abū Yūsuf estimated the inviolable boundaries of a river as one-half the river-bed's width on each side, while Muḥammad ruled that it is a full river width on each side.

- Later Ḥanafīs ruled that the inviolable boundary of a river should be estimated based on need for dumping silt, etc., if the river was dug through a wasteland.
  - With regards to the debate between 'Abū Ḥanīfa and his two companions regarding a river that runs through the property of another, Al-Zaylaʿī said that the best opinion is that the inviolable boundary of such a river is given to the river owner, provided that the latter does not exceed reason in estimating the size of the boundary that he needs.
5. The inviolable boundary of a tree planted in wasteland is five cubits on each side. Thus, people other than the tree owner are not allowed to plant trees within that circle of five-cubits radius, to allow the tree owner access to the tree and its fruits. This ruling is based on a Ḥadīth.<sup>50</sup>

### Mālikī estimates

The Mālikīs ruled<sup>51</sup> that the size of the inviolable boundary of a well is determined based on the size of the well, and the nature of the surrounding land in terms of solidity. They also ruled that the inviolable boundary of a well extends under the surface, thus forbidding people from digging another well that would dry up the first one, or contaminate it with impurities. This is in addition to including the surface, which forbids others from building or planting trees too close to the well.

They ruled that the inviolable boundaries of a house include its entry and exist ways, as well as neighboring areas needed for dumping dust and draining rain waters. They also ruled that the inviolable boundary of a plot of agricultural land reaching 5760 square meters includes the necessary areas for entry and exit, and the boundaries of a village must also include its grazing areas and fire-wood collection areas.

Finally, they ruled that the inviolable boundaries of a tree must be determined by convention to protect the benefits of its owner. Thus, they ruled that a tree owner may prevent others from any action in its neighborhood (e.g. building, planting other trees, digging wells, etc.) if the action would harm the tree.

<sup>50</sup> Narrated by 'Abū Dāwūd in his *Sunan* on the authority of 'Abū Saʿīd Al-Khudriy, c.f. Al-Ḥafīz Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.293).

<sup>51</sup> Al-Dardīr ((Mālikī)A, vol.4, p.89), 'Ibn Juzayy ((Mālikī), p.339).



**Shāfiʿī estimates**

The Shāfiʿīs ruled<sup>52</sup> that estimation of the size of inviolable boundaries is usually determined by convention. Thus, they reasoned that the specific sizes listed in Legal Texts (Ḥadīth) were in fact determined by the needs and conventions of their time. In this regard, the rule used must take into account that an inviolable boundary must include the area needed to ensure full utilization of the property, even if some degree of utilization may in fact take place without that boundary.

Thus, they listed, among other things, the inviolable boundary of a village as containing its congregation areas, room for the horses to run and camels to sit, areas for dumping trash, areas for drainage, playgrounds, etc. They also listed the inviolable boundary of a well dug in wasteland as the area needed for its users to stand, including room for animals if they are needed, as well as the area in which water is collected, etc. For drinking wells, they specified the boundary as simply the area for drinkers to stand.

They also specified the inviolable boundaries of a river as the area needed for depositing silt, as determined by local convention. Similarly, the inviolable boundaries of water channel wells was determined based on whether or not digging in that area would reduce its water, threaten its structural stability, or otherwise affect it adversely.

The inviolable boundary of a house built in wastelands was specified to include room for trash and dust dumping, storage, and passage towards entries and exits. In contrast, they ruled that a house surrounded by other houses has no inviolable boundaries. In the latter case, each homeowner is entitled to act within his property, but if any of them were to transgress against another's, he must thus compensate him for his losses.

Finally, they ruled that it is permissible to revive wastelands surrounding the Holy Mosque in Makkah, since its surrounding utilized land can be owned through sales and other means. However, they ruled that the wastelands of ʿArafāt, Muzdalifah, and Mina, may not be revived, since they are needed for the performance of pilgrimage rituals. Thus, the latter lands are considered of public use in analogy to roads, desert areas used for ʿīd prayers, and public sources of water.

**Ḥanbalī estimates**

The Ḥanbalīs specified the inviolable boundaries for many properties as follows:<sup>53</sup>

- For an old well that dried and was re-dug, the boundary is fifty cubits on all sides.
- For a new well, the boundary is twenty-five cubits on all sides. The two rulings for wells are based on the Ḥadīth narrated by 'Abū ʿUbayd in

<sup>52</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.363 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.424 onwards).

<sup>53</sup> Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.212 onward), 'Ibn Qudāmah (, vol.5, p.542).



*Al-'Amwāl* that Saʿīd ibn Al-Musayyib said: “The Sunnah is to establish an inviolable boundary of fifty feet for an old well, twenty-five for a new well, and three-hundred for a well used to irrigate crops”.

- The boundaries of water springs and channels surrounded by wasteland is five-hundred cubits.
- The boundary of a river is whatever area is needed to deposit its silt to allow it to flow quickly, and any area needed to access the river, or to protect it from harm.
- The boundary of a tree or palm tree is the span of its branches. This ruling is based on the above mentioned Ḥadīth of 'Abū Saʿīd Al-Khudriy that “People brought their dispute regarding the inviolable boundary of a palm tree to the Prophet (pbuh), and he (pbuh) ordered one of its branches to be measured, and ruled according to its length (which was seven or five cubits)”.
- The boundary of agricultural land is whatever is needed for its irrigation, keeping of its work animals, dumping of its manure, water drainage, and other natural functions necessary for agriculture.
- The boundary of a house is the area needed for dumping its dust, sweeping, drainage of rainwater, and passage to its entries and exits. However, there is no inviolable boundary for a house surrounded by the properties of others. The latter ruling follows from the fact that the property of another cannot be used for dumping trash and dust or drainage water. Thus, the ruling in this case is that each owner should use his property as custom dictates, and each may be prevented from exceeding the customary use of his property.

For instance, the Ḥanbalīs ruled that if a man dug a well in his land, and that led to drying the well of his neighbor, the latter is required to compensate the former for the lost water. In contrast, the Ḥanafīs ruled in this case that the owner of the new well is not responsible for any compensation, since they considered subterranean waters to be ownerless, as stated in *Al-Majallah* (item #1288).



## Chapter 109

# Easement Rights (*Ḥuqūq Al-ʿIrtifāq*)

We shall study easement rights in two sections:

1. The first section defines easement rights, and distinguishes them from rights to usufruct. That section will also deal with the juristic characterization of easement rights, and enumerate their general legal status.
2. The second section will discuss in some details the types of easement rights.

### 109.1 Definition and legal status

#### 109.1.1 Definition

Easement rights (*ḥuqūq al-ʿirtifāq*) are legal forms of partial ownership, literally referring to a right of usage of a property.<sup>1</sup> Further, an easement right is a right attached to a specific immovable property (*ʿaqār*), giving rights of usufruct to the owner of another immovable property belonging to another owner.<sup>2</sup>

Easement rights are thus established irrespective of the owner. Those rights include the right to run water through a neighbor's property, the right to run

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<sup>1</sup>We have seen that there are two types of ownership: (i) Total ownership, which includes ownership of the property and its usufruct, and (ii) partial ownership, which is ownership of usufruct. In this regard, ownership of usufruct may be associated with the individual who has that right, and may be associated with the property itself (*ḥaqq ʿaynī*). The latter type remains perpetually attached to the property, and is thus transferred from one party to another.

<sup>2</sup>Legalists distinguish between rights attached to a property and rights attached to an individual. The former is a direct relationship between an individual and a specific property (e.g. ownership rights or easement rights). The latter is a legal relationship between two individuals, one of whom is obliged to take an action, and the other is prevented from taking an action. For instance, the debt relationship between a creditor and a debtor obliges the debtor to repay his debt. Conversely, the relationship between a depositor and a depositary obliges the depositary not to use the deposited property.



sewage and drainage water into a ditch, passage through the property of another, or building over another individual's home. Such rights are established regardless of whether the relevant land is privately or publicly owned, and irrespective of the identities of the owners of the two properties. In this regard, easement rights are rights attached to properties. Hence, if two neighboring properties belong to the same owner, no easement rights are established for either property over the other.

### 109.1.2 Easement rights vs. rights of usage

Both easement rights and usage rights are attached to properties rather than individuals. However, there are some differences between the two types of rights, which we enumerate below:<sup>3</sup>

1. An easement right is established for an immovable property, while a usage right is established for an individual. Thus, the right to pass through one land to get to another is an established right for the second land, to be used by any owner of that land. In contrast, a usage right is established for an individual, and expires upon that person's death, whether it resulted from a contract among the living (e.g. leasing and simple loans) or among the living and the dead (e.g. wills and mortmaines).
2. Easement rights are always attached to immovable properties, and thus affect its market value. In contrast, usage rights may be attached to immovable properties (e.g. loaned land) or movable ones (e.g. loaned book).
3. Easement rights do not expire, and thus juristic schools agree that they may be inherited. In contrast, usage rights have expiry dates. For instance, if a deceased gave usage of his land to an individual in his will, that right would expire upon the death of the beneficiary.

### 109.1.3 Juristic characterization

The Ḥanafīs ruled that easement rights constitute an economic right of usage, but do not constitute a property. As a consequence, they ruled that<sup>4</sup> easement rights are transferred when the land is sold, but they may not be sold independently of the land, or given separately as a gift or charity. Such actions would transfer ownership of the easement right to another, and mere legal rights are not eligible for such transfers. Moreover, they ruled that easement rights may not be used as compensations in any commutative transaction, including debt settlement or compensation for any crime. Similarly, easement rights may not be given as dowry in a marriage contract, since its ownership cannot be transferred thus, and in this case the groom is obliged to pay the bride the average

<sup>3</sup>See *Mukhtaṣar ʾAḥkām Al-Muʿāmalāt Al-Sharʿiyyah* by Professor ʿAlī Al-Khafīf (pp.15-16).

<sup>4</sup>Al-Kāsānī ((Ḥanafī), vol.6, pp.189-190), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.43).



dowry for similar marriages. Finally, a woman may not use an easement right as compensation to her husband for getting divorced, and she must in this case simply pay the ex-husband whichever part of her dowry she had not spent.

The establishment of easement rights as legal economic rights has juristic consequences as well.<sup>5</sup> The Ḥanafīs thus ruled that easement rights may be inherited, since they allow inheritance for some rights (e.g. the defect option) as well as properties. Similarly, they allow the owner of an easement right to pledge it to another in a will (e.g. giving a person the right to use his water rights after his death). However, the will is invalidated in the latter case upon the death of the named beneficiary.

They also permitted the sale of a land without the easement rights belonging to it. In this regard, easement rights (e.g. water rights) are not considered part of the sale unless they are listed explicitly or implicitly (e.g. “I sold you this land with all of its easement rights”) in the sale contract.

### 109.1.4 General legal status rulings

The legal status of easement rights includes general rulings and specific rulings. We shall discuss the specific rulings in the following section dealing with types of easement rights. We now enumerate the general legal status rulings for such rights:

1. Exercising easement rights must not result in harm to others. This ruling is based on the juristic “no harm to others” principle. For instance, the owner of a passage right may not abuse it to harm the property or person of others, and the owner of watering rights may not abuse his right to the detriment of down-stream farmers.
2. Easement rights may be attached to public properties (e.g. large rivers and public roads) or private properties. The non-Ḥanafī jurists ruled that easement rights that are attached to public properties are established for all people, without need of seeking any permission.<sup>6</sup> In contrast, the establishment of easement rights on private property requires the owner’s permission or consent.
3. If an easement right is conventionally recognized, but it is not known how the right was initiated, it is assumed to be an old legitimately established right. Thus, previously established rights are respected, provided that they do not result in harm to others. If a right is found to be harmful, the juristic rule of respecting old rights is overruled by another stipulating that legitimately established old rights cannot be harmful.<sup>7</sup>

<sup>5</sup>ibid., ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.316).

<sup>6</sup>In this regard, the Shāfi‘ī is said: “The usufruct of a public road is passage through it, sitting there to rest, and doing business there as long as others have space to pass. The ruler’s permission is not required for any such utilization of public roads”, c.f. Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.4, p.369).

<sup>7</sup>See *Al-Madkhal Al-Fiqhī Al-‘Āmm* by Professor Al-Zarqā’ (p.596 onwards).



## 109.2 Types of Easement rights

The Ḥanafīs enumerated six main types of easement rights: (i) water rights, (ii) passage rights, (iii) water access rights, (iv) water drainage rights, (v) vertical neighborhood rights, and (vi) horizontal neighborhood rights. They further ruled that it is not permissible to establish other types of easement rights. They based that ruling on the view that such rights put restrictions on ownership. However, they reasoned, ownership rights should be unrestricted with the few named exceptions. Thus, they argued that no further restrictions should be added.

In contrast, the Mālikīs ruled that easement rights are not restricted to the six mentioned above. Thus, they allowed other easement rights to be established by the owner’s consent. For instance, a landowner may agree to a restriction on where he can plant trees or erect buildings, or he may agree to a restriction of the maximum height to which he may build.<sup>8</sup>

### 109.2.1 Water rights (*ḥaqq al-shirb*)

The Arabic term *shirb* refers to a an allotted amount of water, as evidenced by the verse: “Here is a she-camel: she has a right of watering, and you have a right of watering, on a specific day” [26:155]. The term is also used to designate the allotted time for watering, and jurists use it interchangeably in both senses. Legally, the term is applied by most jurists to refer to a water right for watering plants and trees, and some use it for the timing thereof. A special case of *ḥaqq al-shirb* is *ḥaqq al-shafah*, or drinking rights for humans and animals.

There are four types of water with regards to watering and drinking rights: (i) water in containers, (ii) spring and well water, (iii) water of private rivers and streams, and (iv) public waters. In what follows, we shall discuss the rulings for each type of water in some detail.

#### 1. Water in containers

This category includes water whose owner put it in any special storage containers, such as pots, tanks, pipes, etc. Such waters are considered privately owned by their possessor, in analogy to all permissible properties of which a person may take ownership by possession. Thus, the owner of such water may sell it or deal in it as he sees fit, and others have no rights to that water without his permission.<sup>9</sup> Those rulings are based on the Ḥadīth: “The Prophet (pbuh) forbade selling water, except for that carried in containers”.<sup>10</sup> In this regard,

<sup>8</sup>See *Al-Ḥaqq wa Al-’Illtizām* by Professor <sup>c</sup>Aī Al-Kḥaff (p.64), and *Nazariyyat Al-’Aqd* by Yūsuf Mūsā (p.171 onwards).

<sup>9</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.188 onwards), Al-Zayla’ī ((Ḥanafī Jurisprudence), vol.6, p.39), ‘Ibn Al-Humām ((Ḥanafī), vol.8, p.144 onwards), ‘Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, pp.311-3), ‘Ibn Juzayy ((Mālikī), p.339), ‘Abū-’Ishāq Al-Shīrāzī ((Shāfi’ī), vol.1, p.427), ‘Ibn Qudāmah (, vol.5, p.536 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.222), *Al-Kḥarāj* by ‘Abū Yūsuf (pp.95,97).

<sup>10</sup>See *Al-’Amwāl* by ‘ibn Sallām.



the Ḥadīth that forbade selling excess water<sup>11</sup> was restricted by analogy to the Ḥadīth that permitted the sale of forest wood in the possession of a wood-cutter. In the latter Ḥadīth, the Prophet (pbuh) ordered a man to collect and cut wood in order to secure an income and save himself the need to beg.<sup>12</sup>

Despite the fact that such water is considered owned by its possessor, the ownership rights are superseded by drinking need. Thus, a person who fears dying of thirst if he cannot drink that water may take what he needs of it, even by force, provided that the owner did not himself need the water to survive. However, if the person thus takes the owner's water, he must still compensate him for it, based on the juristic ruling that "necessity does not invalidate the rights of others". If the water owner does not need the water for survival but refuses to give it to the person who needs it for drinking, the latter may fight him, but it is best to fight him with non-lethal weapons as a form of chastisement for the sin of preventing him from drinking.

## 2. Water of wells and springs

This category refers to water that a person extracts from the well or spring for his own usage. The Ḥanafis ruled<sup>13</sup> that such water is not owned by the extractor. Rather, they ruled that such water is still available to all, but that the extractor has a special priority right for the water, whether or not the land from which it was extracted was owned or ownerless. This ruling is based on the general principle that water is fundamentally accessible to all people, as per the Ḥadīth: "People are partners in three things: water, grass, and fire".<sup>14</sup>

Thus, drinking rights are established for such water, but watering rights are not. In this regards, nobody has priority rights over others with regards to drinking water. Consequently, anyone may use that water to drink, allow his animals to drink, or use for household necessities. If the possessor of the water refuses to give others drinking rights, then one who needs that water may take it, even by force, provided that he does not have access to other nearby water.

As proof of the drinking rights established for those who need the water, jurists cite the following tradition. It is narrated that a group of travelers reached a well, and asked its owners to allow them to drink and give water to their animals to avoid dying of thirst. The owners of the well refused them access to the water, and when they informed ʿUmar ibn Al-Khaṭṭāb of the incident, he said: "You should have fought them for it with lethal weapons".<sup>15</sup>

<sup>11</sup>Narrated by 'Aḥmad and the authors of the four —it Sunan, with the exception of 'Ibn Mājah. It was deemed valid by Al-Tirmidhī on the authority of 'Iyās ibn ʿAbd.

<sup>12</sup>Agreed upon (by Al-Bukhārī and Muslim) on the authority of 'Abū Hurayrah.

<sup>13</sup>ibid.

<sup>14</sup>Narrated by 'Abū Dāwūd, by 'Ibn Mājah on the authority of ibn ʿAbbās, and by Al-Ṭabarānī in his *Muʿjam* on the authority of 'ibn ʿUmar. It was also narrated by 'Aḥmad. In another Ḥadīth, the Prophet (pbuh) is narrated to have said: "Excess water may not be withheld", i.e. if a person has water in excess of his watering and drinking needs, then he may not sell it or prevent others from using it, unless he owns that water. In this regard, some jurists ruled that water may never be owned.

<sup>15</sup>*Al-Kharāj* by 'Abū Yūsuf (p.97).



We thus notice that the rulings for privately owned water in containers and waters of wells and springs are similar. The main difference between the two categories is that the first is privately owned while the second is not. Thus, one who needs water may fight the first owner for excess water, but without using lethal force. In contrast, the use of lethal weapons is allowed in the second case. Thus, the easement right is clearer in the latter category of water.

In this regard, the majority of Shāfi’is ruled<sup>16</sup> that one who digs a well in ownerless wasteland thus owns the well, and one who digs a well in his own land also owns it thus as growth of his property, in analogy to trees and fruits that grow in his property. However, the Shāfi’is distinguish between the two categories by noting that a landowner is not required to give access to fruits and trees that exceed his needs, while he is required to give access to water in excess of his need to drink, allow his animals to drink, and water his land. The latter ruling is based on the necessity to protect the lives of other humans and animals that need the water for drinking. It is also based on the Ḥadīth in Al-Bukhārī and Muslim: “Do not prevent others from water access to prevent their animals from grazing near your water”. This Ḥadīth refers to public access wells, the waters of which may not be considered the property of any person unless the latter puts it in containers, and owns it thus.

### 3. Private rivers

The legal status of water of small rivers and streams that are privately owned is the same as the water of wells and springs.<sup>17</sup> Thus, drinking rights are established for all, while watering rights are not. In other words, anyone may use this water to drink or allow his animals to drink, even if that causes a minor harm to the river or stream owner. This latter ruling is based on the juristic rule of “accepting the lesser of two harms”. However, nobody has the right to use this water to water his plants and trees without the owner’s permission.

The Ḥanafīs ruled that the owner of a river or stream may not sell watering rights for a given period independently of the river itself. This ruling follows from their general view that legal rights are not properties that can be sold independently. On the other hand, they allowed the sale of watering rights in conjunction with a sale of land. In this regard, we have seen that watering rights are not considered part of the sale of land unless it stated in the contract explicitly or implicitly. They also allowed the sale of known quantities of water in containers for watering, but not for drinking.

In contrast, the Mālikīs, Shāfi’is, and Ḥanbalīs permitted the sale of owned water independently of the land. However, they ruled that it is juristically preferable for the water owner to give it at no charge. If the owner refuses to

<sup>16</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.375).

<sup>17</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.189), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.311 onwards), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.6, p.39), *Al-Kharāj* by ‘Abū Yūsuf (p.95), ‘Ibn Al-Humām ((Ḥanafī), vol.8, p.145), ‘Ibn Juzayy ((Mālikī), p.339), ‘Abū-’Ishāq Al-Shīrāzī ((Shāfi’ī), vol.1, p.427 onwards), ‘Ibn Qudāmāh (, vol.4, p.79; vol.5, p.536), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.221), Al-Ramlī ((Shāfi’ī), vol.4, p.257), Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.375).



give his water at no charge, then the use of force is only allowed in cases of need for drinking water to prevent the death of humans or animals. In the cases where they permitted the sale of water, the Shāfi'is ruled<sup>18</sup> that water must be sold by weight or volume, not based on the number of drinking animals or irrigated area.

#### 4. Water of public rivers

This category includes the waters of all major rivers that run through public lands (e.g. the Nile, the Tigris and the Euphrates, and other major rivers). The legal status of such rivers is that the river, its water, and its path are all publicly owned.<sup>19</sup> Thus, all people have the right to use those waters for drinking as well as watering plants and trees, digging ditches and streams, installing devices to redirect some water to his land, etc. In this regard, the ruler has no right to prevent anyone from using such water unless the user's actions result in harm to the river itself or to others. This is the general ruling reasoned by analogy to the utilization of all public roads and public facilities.

If someone's usage of the river water causes harm to others, then every Muslim has the right to stop him or limit his actions to avoid such harm. This ruling is based on the fact that usage of public properties is always restricted by the general juristic ruling against "causing harm to others".

The establishment of public rivers as public properties is based on the Ḥadīth: "People are partners in three things: water, grass, and fire".<sup>20</sup>

#### General rulings on watering rights

In what follows, we enumerate the most important general rulings regarding watering rights:<sup>21</sup>

1. The person exercising water rights must maintain the borders of the well, spring, or river from which he extracts water. Thus, if the potential user's methods threaten the owner's property, he may prevent him from watering based on the Ḥadīth forbidding "doing harm to others". In this

<sup>18</sup> Al-Ramlī ((Shāfi'ī), vol.4, p.257).

<sup>19</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.192), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.39), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.144), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.211), 'Ibn Juzayy ((Mālikī), p.339), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.428), 'Ibn Qudāmah (, vol.5, p.531), Al-Ramlī ((Shāfi'ī), vol.4, p.205), Al-Khaṭīb Al-Shīrbīnī ((Shāfi'ī), vol.2, p.373).

<sup>20</sup> This Ḥadīth refers to water that is not owned through possession in containers. In analogy to other publicly accessible properties, water becomes owned once its possession is established (by placement in special containers). Moreover, the grass mentioned in this Ḥadīth refers to grass that grows on its own without planting of seeds or watering by humans. Such grass belongs to whoever cuts it and possesses it thus, even if it grew in land owned by another. Finally, the fire mentioned in the Ḥadīth refers to the utilization of fire by using its light and heat, and using it to light other fires. The owner of a fire may not forbid others from utilizing his fire in those manners. However, he does have the right to forbid others from taking his hot coals, since they are viewed as his property, which may thus be protected like other properties, provided that it has some value; c.f. Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.39).

<sup>21</sup> c.f. *Al-'Amuāl wa Naẓariyyat Al-'Aqd fī Al-Fiqh Al-'Islāmī* by Dr. Muḥammad Yūsuf Mūsā (p.175 onwards).



regard, harming the property of another may result from diverting the water path from its usual pattern. If the user does in fact cause harm to the land of another by failing to maintain the boundaries of the water source, he must thus compensate the affected landowner for the damage caused by his negligence. On the other hand, the Ḥanafīs restricted the need to compensate the affected party to the case of unusual utilization of water. However, they ruled, if a neighboring land is flooded during normal watering of one's land, then causing it to flood is not considered a transgression, and no compensation is required.<sup>22</sup>

2. The user of water should use public property for watering passage if such public passages are available. However, if there is not public passage for water, then owners of private properties must give him permission to run his water through their property. This ruling is based on the ruling by ʿUmar (mAbpwh) regarding the complaint of Al-Ḍaḥḥāk ibn K̄halīfa, who wanted to run his water through the land of Muḥammad ibn Maslamah. When the latter refused his request, ʿUmar told him: “I swear by Allāh that he will run his water through your property, even if he has to do it over your very abdomen”.<sup>23</sup>
3. Watering rights may be inherited, or specified in a will. This ruling is accepted even by the Ḥanafīs who otherwise do not allow legal rights and usufruct to be inherited. Moreover, the non-Ḥanafīs allow the sale of watering rights independently of the land. However, the Ḥanafīs did not allow such sales since the object of the sale would be unknown in quantity, thus resulting in harm and injustice. Moreover, the Ḥanafīs based their ruling on the view that legal rights are not valued properties, and thus may not be given independently in a sale, gift, lease, or charity.<sup>24</sup> The non-Ḥanafī ruling is more appropriate, thus treating usufruct and legal rights as valued properties, in agreement with social convention (*ʿurf*).
4. If water has a single owner, then he may use it as he wishes. On the other hand, if the water has multiple owners, few or many, then it must be divided among them fairly. For instance, they may rotate watering days, thus dividing watering rights temporally. Alternatively, they may dig ditches of proportional size to the lands to be watered. The Shāfiʿīs agreed with those provisions for fair distribution of watering rights.<sup>25</sup> Thus, equity in water rights is determined in proportion to the size of land to be watered, in contrast to rights of usage of public roads, which usage is the same for all individuals.

<sup>22</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.149), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.317).

<sup>23</sup>*Tanwīr Al-Ḥawālik Sharḥ Al-Muwaṭṭaʾ* (vol.2, p.218 onwards).

<sup>24</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.316 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.43), Ibn Al-Humām ((Ḥanafī), vol.8, p.150), Al-Kāsānī ((Ḥanafī), vol.6, p.189).

<sup>25</sup>ʿAbū-ʾIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.428), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.375).



Justice also dictates that any change in water right apportionment must be conducted with mutual consent. Thus, no party is allowed to install watering machines, dig or widen ditches, etc. without the consent of others with whom he shares watering rights. Similarly, if the distribution is determined temporally, then changing the distribution to a special one requires mutual consent, and vice versa. Finally, adding more lands to be watered by an individual's watering rights, in the case of special apportionment, could potentially result in harm to others, and thus requires their mutual consent.<sup>26</sup>

5. The Ḥanafis ruled based on juristic approbation<sup>27</sup> that it is permissible to claim watering rights without owning land. They based this ruling on the view that watering rights are beneficial and desirable goods. They also reasoned that such rights may be inherited or received in a will without owning any land. Finally, they reasoned that land can be sold without the watering rights, in which case the original owner of the legal right retains it after the sale of land. Thus, if another were to take this legal right from him, he may sue in a court of law to prove and protect his rights.
6. The order of watering from rainwater or the water of small rivers with limited supply is top-to-bottom. Thus, the highest plots of lands should be watered first until the water is a few inches high, and then the water should be sent to the second highest plot of land, and so on.<sup>28</sup> This ruling is based on the Ḥadīth narrated by ʿUḇādah that “The Prophet (pbuh) ruled with regards to watering palm trees from rain water thus: The higher lands are to be watered first until the water reaches ‘the heels’ of the palm trees. Then, the water should be sent to the second lowest land, and so on, until all the trees are watered or water runs out”.<sup>29</sup>

In this regard, ʿAbdullāh ibn Al-Zubayr also narrated that Al-Zubayr and one of the ʿAnṣār disputed over a small river used to water palm trees. The ʿAnṣārī asked Al-Zubayr to let water flow to his land, and the latter refused. They took their dispute to the Prophet (pbuh), who ordered Al-Zubayr to water his land and then send the water to his neighbor's. The ʿAnṣārī said: “Is this your ruling because he is your cousin, O messenger of Allāh?”. Thus, the Prophet's face changed in color, and he told Al-Zubayr: “Water your land, until the water reaches ‘the heels’ of your

<sup>26</sup>ʿIbn ʿĀbidīn ((Ḥanafī), vol.5, p.315 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.42), ʿIbn Al-Humām ((Ḥanafī), vol.8, p.148 onwards), Al-Ramlī ((Shāfiʿī), vol.4, p.258), ʿAbū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.428), ʿIbn Qudāmāh (, vol.5, pp.533-6).

<sup>27</sup>ʿIbn ʿĀbidīn ((Ḥanafī), vol.5, p.314), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.40), ʿIbn Al-Humām ((Ḥanafī), vol.8, p.147).

<sup>28</sup>ʿAbū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.428), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.373), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.219 onwards), ʿIbn Qudāmāh (, vol.5, p.531).

<sup>29</sup>Narrated by ʿIbn Mājah and ʿAbdullāh ibn ʿAḥmad. It was also narrated by ʿAbū Dāwūd with a good chain of narrators.



palm trees”.<sup>30</sup> Al-Zubayr said that he thought that this ‘Anṣārī was the subject of the verse: “No, by your Lord, they have no faith unless they make you judge in all disputes between them” [4:65].

Mālik also narrated in *Al-Muwattaʿ* on the authority of ‘Abdullāh ibn ‘Abī Bakr ibn Muḥammad ibn ‘Amr ibn Ḥazm that he heard that the Prophet (pbuh) ruled regarding watering with rain water that “they may be held until they reach the heels of the palm trees, and then allowed to flow to lower lands”.<sup>31</sup>

### Maintenance and grafting of rivers

This category includes all changes in rivers used for watering, including grafting (removing mud and silt from the bottom), digging, repairing the banks and bridges, etc. Rulings pertaining to the costs of such activities depend on the type of river. In this regard, there are three types of rivers:<sup>32</sup>

1. The first type includes major public rivers that are not privately owned, e.g. the Nile and the Euphrates. Expenses of maintaining such rivers should be taken from the Muslim treasury, and financed by revenues from *kharāj* and *jizyah*, to the exclusion of revenues from *ushr* and *zakāh*. This ruling follows from the view that such repairs are intended for public benefit, and thus must be encumbered by the Muslim treasury, as per the Ḥadīth: “Output belongs to one who bears the risk” (*al-kharāju bi-l-damān*).<sup>33</sup>

If the Muslim treasury lacks sufficient funds, the ruler may force people to maintain the river if they refuse to do it voluntarily. This ruling is meant to avoid free-riding and ensure public benefits. In this regard, ‘Umar (mAbpwh) indicated that people generally may be too greedy to do what is right, saying: “If left to your own devices, you would probably sell your own children”.

If the public is forced to maintain the river themselves, then the rich should be taxed sufficiently to fund the operation, and the able bodied poor should be required to perform the work, and they can thus be compensated by the funds (taxes!) collected from the rich. This ruling is analogous to the division of responsibilities in preparing Muslim armies.

2. The second type includes rivers that are neither public (in the sense of belonging to everyone), nor privately owned (in the sense of belonging to a known group of individuals). The maintenance costs for such rivers

<sup>30</sup> Agreed upon by Al-Bukhārī and Muslim. It was also narrated by Mālik in *Al-Muwattaʿ* on the authority of ‘Abdullāh ibn Al-Zubayr.

<sup>31</sup> Al-Suyūṭī (b, vol.2, p.217).

<sup>32</sup> Ibn Al-Humām ((Ḥanafī), vol.8, p.46 onwards), Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.313 onwards), Al-Kāsānī ((Ḥanafī), vol.7, p.191 onwards), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.6, p.40 onwards).

<sup>33</sup> Narrated by ‘Aḥmad and the authors of the four *Sunan* books on the authority of ‘A’īsha, but rendered a weak Ḥadīth by Al-Bukhārī, c.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.30).



should be encumbered by those who benefit from its waters, based on the rule of “benefits being justified by risks and other costs”. If anyone who benefits from the river refuses to contribute to its maintenance, he may thus be forced to do so, in order to protect the general benefit of all other beneficiaries.

3. The third and final type of rivers are those owned by a known finite group of individuals. The maintenance costs of such rivers are also encumbered by their owners who benefit from their waters. However, if all the owners decide not to maintain the river, the ruler may not force them to do so. The latter ruling is in analogy to other private properties, which the owner is not required by law to maintain. On the other hand, if some of the owners choose to contribute to the river’s maintenance, while others refuse, jurists disagreed over whether or not those who refused should be forced to contribute. Those who ruled that the non-contributing owners may be forced to contribute relied on the view that the benefits from the river affect all the owners. In contrast, those who ruled that they may not be forced argued that forcing them to contribute harms them, and that the harm caused to other partners may be removed by allowing them to maintain the river by court order, and establish the non-contributing partners’ shares as debts to be collected later.

Jurists also differed over the division of maintenance costs if the river’s path requires repairing areas other than its source:

- ‘Abū Ḥanīfa ruled that owners of land between the source and the area to be maintained are not required to share in the maintenance cost. He based this ruling on the view that the purpose of maintenance is to allow owners to water their land. Thus, since the upstream landowner can water his land without need of maintaining downstream stretches of the river, he should not contribute to maintenance that will only help others.
- ‘Abū Yūsuf and Muḥammad ruled that all partners must share in the cost of maintenance in proportion to the sizes of their lands and the water requirements thereof. They based this ruling on the view that the upstream landowner still benefits from maintaining the river downstream to ensure proper drainage. This opinion seems to be more reasonable than that of ‘Abū Ḥanīfa.

All three Ḥanafī masters agreed that the cost of repairs near the source should be borne by all partners, since all their benefits depend on such repairs.

### 109.2.2 Drinking rights

“Drinking rights” include the rights for humans to drink, allow their animals to drink, and obtain sufficient water for domestic usage such as cooking, washing,



etc.<sup>34</sup> The rulings for drinking rights are very similar to those of watering rights, with some minor differences indicated below.

The rulings for drinking rights depend on the type of water involved. In this regard, jurists considered four types of water:<sup>35</sup>

1. Sea water is considered ownerless. Thus, everyone has watering and drinking rights in this water, and is authorized to use it in anyway. In this regard, using sea water is the same as using the sunlight, moonlight, and air.
2. All people have drinking rights and watering rights in the water of major rivers such as the Nile, the Euphrates, Tigris, etc., provided that the usage does not harm society. This ruling follows from the permissibility of acquiring and using such ownerless property. Such permissibility is always restricted by the provision of causing no harm to any members of society, e.g. by destroying river banks and thus causing flooding of villages and agricultural lands.
3. All people also have drinking rights in the waters of small rivers owned by various communities. This ruling is based on necessity, and the default ruling of partnership in water, based on the Ḥadīth: “People are partners in water, grass, and fire”. Moreover, since carrying large amounts of drinking water is not feasible, it is necessary to establish drinking rights to all people to avoid major harm.

However, if the owned river or well was located in owned land, the landowner may forbid others their drinking rights by preventing them from entering his land, provided that there is other water nearby.<sup>36</sup> If there is no water nearby, then the landowner must either take the water out to the one who needs to drink, or allow him to get to the water in a manner that does not harm the river or well. This ruling is again based on the universal establishment of drinking rights for those who need water for their own survival or the survival of his animals.

If the landowner prevents one in need of water from accessing it, then the latter may fight him using lethal weapons, and he may then take as much water as he needs to avoid perishing. This ruling is based on the previously cited statement of ʿUmar authorizing those in need of water to fight for it if necessary. The ruling is further supported by the view that the needy person thus has an established drinking right in the water, and the landowner is considered a transgressor by preventing him from exercising that right.

<sup>34</sup> *Mukhtaṣar Al-Muʿāmalāt Al-Sharʿiyyah* by Sheikh ʿAlī Al-Khāfī (p.18).

<sup>35</sup> Ibn Al-Humām ((Ḥanafī), vol.8, p.144 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.6, p.40), Al-Kāsānī ((Ḥanafī), vol.6, p.188 onwards), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.311 onwards).

<sup>36</sup> Nearness of water is determined by a circle of one-mile radius, as in the case of using dust for ritual ablution when water is not available.



Most jurists go further by authorizing people to take some of that water with them to perform ritual ablutions and wash their clothes. This ruling is based on the view that forbidding people access to water for such functions is a form of lowliness. The Prophet (pbuh) said: “Allāh likes high moral standards, and hates lowliness”.<sup>37</sup> In contrast, most jurists agree that the water owner is allowed to prevent others from taking his water for tree and plant watering at his home, unless he is willing to permit him to do so.

Finally, if the landowner had a small water stream and felt that the incoming livestock would drink all the water if allowed, most jurists agreed that the owner may thus prevent the animals from drinking his water. This ruling is made in analogy to the case of using his water for watering plants, since both cases may cause significant harm to the owner.

4. Water possessed in special containers is considered owned by its possessor. Thus, no person other than the owner has any drinking, watering, or other rights to this water without the owner’s permission.

However, we have previously seen that one in need of the water for drinking to avoid perishing may fight the owner (without the use of lethal weapons) for the water, provided that he cannot find other water nearby, and that the owner himself does need the water for survival.

### 109.3 Water passage rights

The owner of land that is far away from a water source has the right to pass water through the property of another to enable him to water his land. The actual water passageway may be owned by the owner of the far away land, the owner of the intermediate land, by both, or by a larger group of people.

The general ruling in this regard is that the owner of an intermediate land is forbidden from preventing his neighbor from running water through his property, as per the above mentioned ruling of ‘Umar. Moreover, the landowner is not allowed to move the water passageway without the full consent of its beneficiaries, who also have the right to repair the passageway or modify it to improve its function. The landowner is also allowed to demand that the beneficiaries repair their water passageway, to ensure that water does not seep into his land and ruin his crops.

If the water passageway is shared by a number of people, none of them is permitted to plug it without their mutual consent to alternate plugging it to water their respective lands sequentially. This condition is based on the juristic rule: “A private harm is tolerated to avoid public harm”. If a person’s partners forbid him from stopping the water flow to water his land, then he is permitted to use a machine to pump water to his land.<sup>38</sup>

<sup>37</sup>A good Ḥadīth narrated by Al-Ṭabarānī on the authority of Al-Ḥusayn ibn ‘Alī.

<sup>38</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.190 onwards), *Al-’Amwāl wa Naẓariyyat Al-’Aqd* (p.176 onwards), *Mukhtaṣar Al-Mu’āmalāt Al-Shar’iyyah* (p.20).



If a right to water passage historically applied to some land, it should be maintained,<sup>39</sup> based on the juristic rule: “Old rights are left in place” (grandfather rule). An exception to this case exists if retaining the existing rights causes harm to the landowner, based on another juristic rule: “Old rights cannot be harmful”.

If a new water passageway needs to be constructed through public property, then its construction requires an official government permission, to avoid harming public interests. On the other hand, if a new passageway needs to be built through a private property, the owner’s permission should be sought. However, the landowner is not allowed to prevent the building of such water passageways, as shown by the above mentioned ruling of ‘Umar empowering Al-Ḍaḥḥāk to dig a water passageway through the land of Muḥammad ibn Salamh, even if by force.<sup>40</sup>

## 109.4 Drainage rights

The difference between water passage rights and drainage rights is that the former pertains to passing good water from a water source to one’s land, while the latter refers to passing used or polluted water from one’s land to a ditch or other disposal area. Drainage rights may be established through a covered pipe, or through an uncovered drainage passageway. Such passageways may be owned by the beneficiary, the owner of the land through which it runs, or it may be a public utility.

If a land is designated for the passage of drainage of a neighbor, the landowner is not allowed to object to that designation unless such drainage causes a demonstrable harm to his property. Moreover, such designation for drainage passage remain intact even if the land changes its nature (e.g. from agricultural land to residential or industrial property).

Old drainage rights are respected as long as they do not cause public or private harm to others. As we have seen the latter qualification is based on the juristic rules that “causes of harm must be removed”, and “old rights cannot be harmful”.

Finally, the costs of maintaining drainage must be encumbered by the beneficiary, whether the drainage passageway runs through his property or the property of another. If the drainage passageway runs through public property, then its maintenance should be paid out of the Muslim treasury.<sup>41</sup>

<sup>39</sup>Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.314), *Al-Kḥarāj* by ‘Abū Yūsuf (p.99).

<sup>40</sup>Narrated by Mālik in his *Muwatṭa’* (vol.2, p.218), and by Yaḥyā ibn ‘Adam in his *Al-Kḥarāj* (p.110).

<sup>41</sup>Lecture notes: *Mukhtaṣar Al-Mu‘āmalāt Al-Shar‘iyyah* by Sh. ‘Alī Al-Kḥafīf (p.20 onwards).



## 109.5 Passage rights

People have the right of passage to get to their property, whether by passing through public property, the private property of another, or property jointly owned by one and another. The ruling pertaining to passage rights depend on the type of road:

1. All people may use public roads for passage, opening windows or alleys that lead to it, parking animals and automobiles, or establishing centers for trading. Those freedoms are unrestricted except for two conditions:<sup>42</sup>
  - (a) Safety and avoidance of harming others. This is based on the Ḥadīth: *“lā ḍarara wa la ḍirār”*.<sup>43</sup>
  - (b) Obtaining the ruler’s permission.

All jurists agree that actions that harm others are not permitted in public roads. ‘Abū Ḥanīfa ruled that even if the user does not cause harm to others, he still needs the ruler’s permission to use the public road, while ‘Abū Yūsuf and Muḥammad ruled that this permission is not necessary. The Shāfi‘īs and Ḥanbalīs also ruled that an official permission to use public roads is not required.<sup>44</sup> They based this ruling on the Ḥadīth: “Whoever beats other Muslims to any ownerless property thus has priority for that priority”.

The Mālikīs, ruled further that it is not permissible to build on public roads or make any additions to one’s own property causing incursion into the public roads.<sup>45</sup> In this regard, the Shāfi‘īs ruled<sup>46</sup> that any building or incursion into a public road is deemed to harm the rights of other users of the road, and are thus forbidden.

2. Only the owners of a private road and their families are entitled to use it. Thus, others are not permitted to open a door or window leading to that road. However, if the public roads are crowded, then all people have a right of passage through the private road. Consequently, the owners of a private road are not permitted to block or remove it, in order to protect the public benefit it provides to others.

If the private road has multiple owners, then none of them has the right to build, or cause incursions into the road by opening a window or door, without the mutual consent of all owners. If one of the partners is given

<sup>42</sup> ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.319 onwards), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.6, p.142 onwards), *Jāmi‘ Al-Fuṣūlayn* (vol.2, p.197), ‘Ibn Al-Humām ((Ḥanafī), vol.8, p.330 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.182).

<sup>43</sup> Meaning no initial causing of harm, and no excessive punishment that amounts to causing new harm.

<sup>44</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.369), ‘Ibn Qudāmah (, vol.5, p.544).

<sup>45</sup> ‘Ibn Juzayy ((Mālikī), p.341).

<sup>46</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.182).



such a permission, and then sells his interest to a new partner, the latter needs to seek a new permission to build a new room, window, etc.<sup>47</sup>

## 109.6 Vertical neighborhood rights

The Ḥanafīs ruled that an upstairs neighbor always has the right to maintain the structure of the downstairs neighbor, without owning the latter’s roof. Thus, they ruled that this right does not perish if either the upstairs structure, or the downstairs structure, or both, perish. Thus, this right for the upstairs neighbor continues to exist, and is thus transferred to heirs upon the death of its possessor.

The Mālikīs ruled<sup>48</sup> that the roof of the downstairs neighbor belongs to that neighbor, who thus is required to repair or rebuild it if necessary. However, they agree with the Ḥanafīs in establishing the right of the upstairs neighbor to live above that roof.

In contrast, the Shāfi’īs ruled<sup>49</sup> that the downstairs neighbor’s roof is jointly owned with the upstairs neighbor. They based this ruling on the view that both neighbors share in using that entity as a roof for the downstairs neighbor, and a floor for the upstairs neighbor, in analogy to common walls shared by horizontal neighbors. Hence, they ruled that neither neighbor has the right to make an opening, attach a beam, to otherwise, to that roof/floor without the consent of the other. They further ruled that the upstairs neighbor should use the roof/floor according to social custom. Finally, they ruled that if the roof/floor was destroyed, then neither party may force the other to rebuild it. They based the latter ruling on the juristic rule that “harm cannot be removed through another harm”, and the fact that the forced party would thus be harmed by bearing an expense of rebuilding.

The Ḥanafīs ruled that the upstairs neighbor’s right may not be sold independently of the property itself. They based this ruling on their view that such legal rights do not constitute valued properties, and thus may not be sold. In contrast, the non-Ḥanafīs ruled that that right may be sold independently, since they considered legal rights to be properties. The non-Ḥanafī ruling in this case seems to be more logical, more appropriate juristically, and closer to social customs.

’Abū Ḥanīfa differed in opinion with ’Abū Yūsuf and Muḥammad over the scope of actions permissible for the upstairs and downstairs neighbors:<sup>50</sup>

<sup>47</sup>’Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.320), ’Ibn Al-Humām ((Ḥanafī), *ibid.*), Al-Zayla’ī ((Ḥanafī Jurisprudence), *ibid.*), ’Ibn Juzayy ((Mālikī), p.341), Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.184).

<sup>48</sup>’Ibn Juzayy ((Mālikī), p.341).

<sup>49</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.193), Al-Nawawī’s *Rawḍat Al-Ṭālibīn* (vol.4, pp.219,226).

<sup>50</sup>Al-Zayla’ī ((Ḥanafī Jurisprudence), vol.4, pp.194-196), ’Ibn Al-Humām ((Ḥanafī), vol.5, pp.502 onwards,506), Al-Kāsānī ((Ḥanafī), vol.6, p.264 onwards), ’Ibn ‘Ābidīn ((Ḥanafī), vol.4, pp.375-7).



- 'Abū Ḥanīfa ruled that the default ruling is lack of freedom in dealing with one's property if rights of another are attached to it. Thus, he ruled that a neighbor is not allowed to deal in his property without the approval of his neighbor whose rights are attached to the property, whether or not the dealing may affect that neighbor adversely. In particular, the downstairs neighbor is not allowed to make any changes to his structure (e.g. opening a window, moving a wall, putting a beam, etc.) without his upstairs neighbor's approval, even if the change does not harm the latter. On the other hand, the upstairs neighbor is not allowed to add any building that may weaken the lower structure.
- In contrast, 'Abū Yūsuf and Muḥammad ruled that the default ruling is permissibility of actions in one's property, unless his actions are harmful to others. Consequently, they ruled that the downstairs neighbor is allowed to change his property in any manner that does not harm the upstairs structure. Their opinion was selected by latter Ḥanafīs based on juristic approbation,<sup>51</sup> and this is the more logical and more appropriate opinion in this case.

## 109.7 Horizontal neighborhood rights

Each neighbor has an easement right towards the property of his immediate horizontal neighbor, provided that he does not cause any harm to that property. In this regard, avoiding any action that may harm one's neighbor is a religious duty on Muslims, as per the Ḥadīth: "If a man's neighbors are not safe from his evil deeds will not enter paradise".<sup>52</sup> Despite that general ruling, jurists stipulated a number of rulings that prevent harming one's neighbor, as detailed below.<sup>53</sup>

'Abū Ḥanīfa ruled by analogy, and the Shāfi'īs and Zāhirīs agreed with the ruling, that a property owner is allowed to deal in his property as he wishes, even if his action causes harm to others. Thus, he has the right to open any windows he wishes, remove any walls, digs any wells, erect any factories, and use the building as a house or store as he wishes. However, the Shāfi'īs ruled according to the latter Shāfi'ī opinion<sup>54</sup> differently regarding joint walls between neighbors. Neither partner is allowed to make any changes or otherwise affect the joint wall or use it for support without his neighbor's permission. However, they allowed such usage of a third party's wall as long as the usage does not affect that wall's owner adversely.

In contrast, 'Abū Yūsuf and Muḥammad ruled by juristic approbation that the owner of any immovable property is forbidden from taking any actions that

<sup>51</sup> 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.375).

<sup>52</sup> Narrated by Muslim on the authority of 'Abū Hurayrah.

<sup>53</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.264 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.506), Al-Sarakhsī (1st edition (Ḥanafī), vol.15, p.21), Al-'Umm (vol.3, p.222 onwards), Al-Muḥallā (vol.8, p.241; 1355 C.E.), *Mukhtaṣar Al-Mu'āmalāt Al-Shar'īyyah* (p.23).

<sup>54</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.189).



may cause a demonstrable and significant harm to his neighbor. This is the opinion accepted by the later Ḥanafīs, and adopted in *Al-Majallah*. It is based on the Ḥadīth: “No harm, and no excessive counter harm”. The determinant of whether a harm is demonstrable and significant is whether it can weaken the neighbor’s structure, cause part thereof to fall, or otherwise harm him in a permanent manner. This category of harm also includes any outcome that makes it impossible for the neighbor to use all of his property (e.g. if he blocks the light from his neighbor’s yard or increases the level of air and sound pollution in the neighborhood). If a neighbor undertakes any action that causes such demonstrable and significant harm to his neighbor directly or indirectly, he is ordered to remove the causes of harm and to pay compensation for that harm.

The Mālikīs and Ḥanbalīs ruled<sup>55</sup> similarly that the owner of a property is not allowed to use it in any way that harms others, even if he only intended to harm them without actually doing so. Thus, if there is no apparent benefit that he may derive from his action, or if it is obvious that the action is meant to harm others, the owner may thus be prevented from undertaking the action. This ruling is based on the fact that Muslims are forbidden from intentionally causing harm to others.

However, most of the Mālikīs ruled that a person should not be prevented from raising his building in a manner that may block the light from reaching his neighbor. In contrast, the majority ruled that he would be forbidden from building in a way that blocks air from his neighbor. Moreover, all Mālikīs agreed that ways of causing new harm (e.g. making a hole in the wall that exposes the neighbor’s home) are forbidden. Similarly, uses of one’s property that increase the level of noise or air pollution in the property of one’s neighbor are not allowed (e.g. establishing an iron-smith shop in a residential neighborhood), unless he can use pollution-abatement devices to protect his neighbor. Finally, they ruled that allowing water to flow in ways that harm the neighbor’s property is also forbidden.

In summary, the main thrust of Islamic jurisprudence allows owners to use their properties in any manner that does not harm their neighbors in a significant manner. Similarly, if any rights or patterns of usage existed prior to neighborhood, they are left in place unless they harm the new neighbor.

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<sup>55</sup> *Al-Muwāfaqāt* (vol.2, p.349), ‘Ibn Juzayy ((Mālikī), p.341).



## Part XIX

# Share-cropping Arrangements



# Chapter 110

## *Muzāraʿa* or *Mukhābara*

In this chapter, we shall study this contract in terms of its definition, legality, cornerstones and contract characteristics, conditions, types and states, legal status, termination and various voiding cases. Those sub-topics will be covered in five sections.

### 110.1 Definition, legality, and cornerstones

#### 110.1.1 Definition

*Muzāraʿa* refers literally to joint acts of planting. The term refers legally to a contract for planting compensated with part of the produce.<sup>1</sup> The Mālikīs defined it as a partnership in crops.<sup>2</sup> The Ḥanbalīs defined it as a landlord giving a farmer access to work his land or plant it, with an agreement to share the crop.<sup>3</sup>

The contract is also called *mukhābara*, derived from *khabār*, meaning fertile land, or *muḥāqala*. In Iraq, the contract is called *qarāḥ*. In this regard, the Shāfiʿīs defined *mukhābara* as working the land in exchange for part of the produce, where the worker/farmer provides all seeds. In contrast, they defined *muzāraʿa* as a similar contract, where the landlord provides the seeds.<sup>4</sup>

In summary: *muzāraʿa* is an investment contract involving agricultural land. The two parties to the contract are the landlord and the worker/farmer. The contract specifies that crop is to be shared between the parties according to agreed-upon shares.

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.175), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.278), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.193), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.32).

<sup>2</sup> Al-Dardīr ((Mālikī)A, vol.3, p.372), 'Ibn Juzayy ((Mālikī), p.280).

<sup>3</sup> 'Ibn Qudāmah (, vol.5, p.382), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.523).

<sup>4</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.323 onwards).



### 110.1.2 Legality

'Abū Ḥanīfa and Zufar rendered *muzāra<sup>c</sup>a* impermissible and defective. In other words, they considered *muzāra<sup>c</sup>a* contracts for one-third or one-quarter of the produce to be invalid.<sup>5</sup>

Similarly, Al-Shāfi'ī deemed *muzāra<sup>c</sup>a* to be impermissible. In this regard, the Shāfi'īs later permitted the contract as a derivative of the *musāqāh* contract (discussed below) if the need should dictate it. Thus, if there were empty spaces between palm trees subject to a *musāqāh* contract, then they deemed *muzāra<sup>c</sup>a* with the same worker/farmer over the land to be valid if it is difficult to water the palm trees to the exclusion of the adjacent spaces. In this case, it is commonly assumed that the farmer's watering and aeration of the land between palm trees benefits those trees. However, the Shāfi'īs argued that it is better to stipulate both contracts simultaneously, and avoiding stipulation of the *muzāra<sup>c</sup>a* contract prior to the *musāqāh* contract, since the former is derivative of the latter. Finally, the Shāfi'īs deemed *mukhābara* derivative to *musāqāh* to be invalid, since they do not recognize the validity of the former.<sup>6</sup>

'Abū Ḥanīfa, Zufar, and Al-Shāfi'ī based their ruling of invalidity of *muzāra<sup>c</sup>a* on the Prophet's (pbuh) prohibition of *mukhābara* (which is the same as *muzāra<sup>c</sup>a*).<sup>7</sup> In addition, they reasoned that the wages of the farmer (his share of the land's produce) is non-existent at the inception of the contract, and its future amount is uncertain. The former non-existence of one compensation of the contract, and the latter ignorance of its future amount, render a lease or hiring contract defective.

In this regard, the Prophet's (pbuh) dealing with the people of Kḥaybar, which we shall discuss below, was taking a fixed percentage of the produce (e.g. one-third or one-quarter of its output) as a tax (*kḥarāj*) based on mutual agreement, which is permissible.<sup>8</sup> However, many Shāfi'ī jurists ruled that this dealing of the Prophet (pbuh) with the people of Kḥaybar was sufficient proof to legalize *muzāra<sup>c</sup>a* as a separate contract. Moreover, they deemed *mukhābara* to be akin to *muzāra<sup>c</sup>a*.

The majority of jurists, including 'Abū Yūsuf and Muḥammad, Mālik, 'Aḥmad, and Dāwūd Al-Ẓāhirī, ruled that *muzāra<sup>c</sup>a* is permissible, based on the above

<sup>5</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.32). In this regard, they mentioned one-third or one-quarter shares since those were the conventional share-cropping shares during their time. Moreover, they specified specific shares to highlight the source of their disagreement with the contract's validity, since everyone agrees that the contract would be defective if the shares were not specified.

<sup>6</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.324), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.349).

<sup>7</sup>Narrated by Muslim on the authority of Jābir ibn 'Abdillāh and 'Ibn 'Umar, that Rāfi' ibn Khudayj narrated that the Messenger of Allāh forbade the contract (c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.180). Muslim also narrated on the authority of Thābit ibn Al-Daḥḥāk that the Messenger of Allāh (pbuh) forbade *muzāra<sup>c</sup>a*. 'Abū Dāwūd, Al-Nasā'ī, 'Aḥmad, and Al-Bukhārī also narrated the Ḥadīth of Rāfi' forbidding the rental of agricultural land, c.f. Al-Shawkānī (, vol.6, pp.275,280).

<sup>8</sup>There are two types of agricultural land taxes (*kḥarāj*): (i) a fixed known amount for each fixed area of open land, and (ii) a fixed share of the land's produce, c.f. Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.278).



mentioned dealing of the Prophet (pbuh) with the people of K̤haybar for a share in their crops or fruits.<sup>9</sup> In addition those jurists reasoned that the contract is a partnership between property and work, which is thus deemed permissible in analogy to *muḍāraba*, to meet people's needs. In this regard, the landowner may not be skilled in agriculture, and thus cooperating with a farmer can be mutually beneficial.

In this context, the Ḥanafīs accept the opinions of 'Abū Yūsuf and Muḥammad, based on need for such contracts, and their common usage in convention. This opinion seems to be most appropriate since the contract is similar both to partnerships and to leasing. Similarity to partnerships arises from sharing the produce according to agreed-upon ratios, while similarity to leasing arises from jointly using the land, and compensating the worker with a share of the crop. On the other hand, the contract differs from partnerships in that the landlord's share is a percentage of the land's produce rather than a percentage of the net profits. Similarly, the contract differs from simple leasing since the rent is specified as a fixed share of the output. Indeed, were the rent specified as a fixed amount (e.g. a ton of wheat or rice), the contract would be a standard lease rather than share-cropping.

### 110.1.3 Cornerstones and characteristics

The Ḥanafīs ruled that the cornerstones of *muzāraʿa* are offer and acceptance. For instance, the landlord may give the farmer access to the land, saying: "I give you this land under a contract of *muzāraʿa* according to such-and-such shares", and the worker states his acceptance of that offer. Thus, with the offer and acceptance, the contract would be concluded.<sup>10</sup>

The three parties to the contract are: the landlord, the farmer or worker, and the object of the contract, which may be seen as either the land's usufruct, or the farmer's labor. In this regard, the Ḥanafīs considered the contract a least at its inception, and a partnership at its conclusion. Moreover, they ruled that the object of the contract is the land's usufruct if the farmer provided the seeds, and the farmer's labor if the landlord provided the seeds.

The Ḥanbalīs ruled that *muzāraʿa* and *musāqāh* do not require a verbal acceptance of the offer. Thus, they ruled that if the farmer commences working the land, that is considered an implicit acceptance, in analogy to the agency contract.<sup>11</sup>

The Ḥanafīs characterized the *muzāraʿa* contract as a non-binding contract, in analogy to other forms of partnership. In contrast, the Mālikīs ruled that once the seeds are sown, or seedless bulbs are planted, the contract becomes binding. This is similar to the accepted opinion among Mālikīs that property partnerships

<sup>9</sup>Narrated by 'Aḥmad and the six major narrators on the authority of 'Ibn 'Umar. Also narrated on the authorities of 'Ibn 'Abbās and Jābir ibn 'Abdillāh, c.f. Al-Shawkānī (, vol.5, p.272).

<sup>10</sup>Al-Kāsānī (Ḥanafī), vol.6, p.176).

<sup>11</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.528 onwards).



become binding by virtue of the contract language.<sup>12</sup> The Ḥanbalīs, on the other hand, agreed with the Ḥanafīs and ruled that *muzāra<sup>c</sup>a* and *musāqāh* are non-binding contracts that may be voided by either party, and that are deemed void and invalid upon the death of either one.<sup>13</sup>

## 110.2 *Muzāra<sup>c</sup>a* conditions

In the Ḥanafī school, 'Abū Yūsuf and Muḥammad stipulated conditions for the contracting parties, the crop, the plant, the land, the contract object, the method of planting, and the period of *muzāra<sup>c</sup>a*.<sup>14</sup>

### 110.2.1 Contracting party conditions

There are two general conditions in contracts:

1. Each contracting party must be sane and discerning. Thus *muzāra<sup>c</sup>a* is not valid if conducted by an insane person or a non-discerning child, since sanity and discernment are eligibility conditions for all dealings.

On the other hand, the Ḥanafīs do not require contracting parties in *muzāra<sup>c</sup>a* to be of legal age, thus allowing the *muzāra<sup>c</sup>a* of a permitted discerning child, in analogy to their ruling in leasing and hire contracts. This ruling by analogy is based on the view that *muzāra<sup>c</sup>a* is a form of leasing in exchange for a share in the output. On the other hand, the Shāfi'īs and Ḥanbalīs ruled in accordance to their view in other contracts that being of legal age is a requirement for the validity of a *muzāra<sup>c</sup>a* contract.

2. 'Abū Ḥanīfa ruled that validity of *muzāra<sup>c</sup>a* requires that the contracting party is not an apostate male, since he deemed all dealings of an apostate to be suspended. In contrast, 'Abū Yūsuf and Muḥammad deemed the *muzāra<sup>c</sup>a* of an apostate male valid and executed. On the other hand, all Ḥanafīs agreed that *muzāra<sup>c</sup>a* is valid for an apostate female.

### 110.2.2 Crop conditions

The crop must be known to all parties. This ruling follows from the fact that different crops affect the land differently. On the other hand, the ruling based on juristic approbation does not render disclosure of the type of crop a condition of the contract, giving the farmer full discretion in selecting the crop.

<sup>12</sup> Al-Zayla<sup>c</sup>ī ((Ḥanafī Jurisprudence), vol.5, p.278), Al-Dardīr ((Mālikī)B, vol.3, p.492 onwards).

<sup>13</sup> Mar<sup>c</sup>ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.154).

<sup>14</sup> Al-Kāsānī ((Ḥanafī), vol.6, pp.176-180), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.34 onwards), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.230), Al-Zayla<sup>c</sup>ī ((Ḥanafī Jurisprudence), vol.5, p.279), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.193).



### 110.2.3 Plant conditions

The planted crop must be eligible for growth in standard agricultural conditions. In other words, it must be a kind of plant that conventionally grows as farming labor is applied.

### 110.2.4 Produce conditions

The contract is deemed defective if the following conditions are not met:

1. Nature of the produce must be specified in the contract, since it resembles rent, ignorance of which would render the lease defective.
2. The produce must be shared between the contracting parties, thus the contract is deemed defective if all of the produce is given to one of them.
3. Shares in the produce must be specified (e.g. one-half, one-third, etc.), otherwise the contract would contain ignorance that may lead to dispute.
4. The produce must be divided according to un-identified shares. Thus, if one of the parties is guaranteed a fixed amount, or the output of a fixed part of the land, the contract would not be valid, since that may be equal to the total produce.

Similarly, it is not valid to specify that the produce near a waterwheel or a water-stream belongs to one of the contracting parties, since the entire crop may come from those areas. Finally, it is not permissible to specify that the kernels belong to one contracting party and the chaff belongs to the other, since it is possible for all kernels to be destroyed by some natural cause, making the entire output chaff.

The Mālikīs stipulated a condition that both parties must share equally in the produce. In contrast, the Shāfi'īs and Ḥanbalīs agreed with the Ḥanafī ruling allowing the pre-specified ratio to be different from one-half.

### 110.2.5 Agricultural land conditions

The following conditions pertain to the land:

1. The land must be fertile. Thus, if the land is a swamp or otherwise infertile, the contract would be deemed impermissible. This ruling follows from the fact that *muzāra<sup>c</sup>a* is a form of lease in exchange for a share of output, and swamps and similar lands may not be leased, and therefore do not qualify for *muzāra<sup>c</sup>a*.
2. The land must be known for the *muzāra<sup>c</sup>a* to be valid, since ignorance may lead to disputes.
3. The worker/farmer must be given full access to the land. Thus, if the contract includes a condition that the landlord must work the land, or must share in the work, the *muzāra<sup>c</sup>a* would be deemed invalid.



### 110.2.6 Object of contract conditions

The object of a *muzāra<sup>C</sup>a* contract must be legally and conventionally accepted as an agricultural activity. This follows from the fact that the object of the contract is either the land's usufruct (if the worker provided the seeds) or the farmer's labor (if the landlord provided the seeds).

Thus, if the object of the lease contract is both the land's usufruct and the farmer's labor (by violating the above listed two conventions), the *muzāra<sup>C</sup>a* would be deemed defective. The *muzāra<sup>C</sup>a* would also be defective if the nature of labor is non-agricultural (e.g. quarrying or paving roads), the *muzāra<sup>C</sup>a*.

### 110.2.7 Means of production conditions

The usage of tools or livestock in agricultural production must be derivative of the contract, and not its purpose. Thus, if the contract is written for the express purpose of using such tools or animals, the *muzāra<sup>C</sup>a* would be deemed defective.

### 110.2.8 Contract period conditions

The period of *muzāra<sup>C</sup>a* must be known, since the contract is in essence a lease in exchange for a crop-share. Since leases are invalid if their period is not known, so is *muzāra<sup>C</sup>a*. In this regard, the period of *muzāra<sup>C</sup>a* is determined by convention. Thus, the contract would be deemed defective if the farmer is not given access to the land for part of the period, or if either party dies prior to its expiration.

On the other hand, the accepted opinion in the Ḥanafī school is that *muzāra<sup>C</sup>a* is valid even if the period is not specified. The period of the contract is thus implicitly defined as the time it takes for one crop to grow.<sup>15</sup>

In summary, 'Abū Yūsuf and Muḥammad deem a *muzāra<sup>C</sup>a* to be valid if it satisfies eight conditions:

1. Eligibility of the contracting parties.
2. Specification of the contract period (the accepted opinion in the Ḥanafī school does not require this condition).
3. Fertility of the land, and possibility of tilling it.
4. Giving the farmer access to the land.
5. Produce must be shared according to un-identified shares, to effect the essence of partnership.
6. Identification of the party responsible for providing the seeds, to avoid disputes, and identify the object of the contract as either the land's usufruct, or the farmer's labor.

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<sup>15</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, p.193).



7. Specifying the shares of both parties, the one providing the seeds and the one not providing them.<sup>16</sup>
8. The genus of the seeds must be known so that the genus of the wages is known, and since different types of seeds require different amounts of labor to yield a significant crop. On the other hand, the ruling according to juristic approbation does not stipulate this as a condition.

As for the period of the contract, the Ḥanafīs and apparent opinion of 'Aḥmad do not stipulate its specification as a condition. In contrast the Mālikīs and Shāfi'is stipulated that the *muzāra<sup>c</sup>a* period must be known.

### Mālikī conditions

The Mālikīs stipulated three conditions in *muzāra<sup>c</sup>a*:<sup>17</sup>

1. Avoidance of leasing land for a forbidden rent. For instance, the land or part thereof must not be exchanged for seeds, foodstuffs (grown on the land or otherwise, e.g. honey), or land output (e.g. cotton) other than wood. In other words, validity of a *muzāra<sup>c</sup>a* requires that land is leased in exchange for a rent paid in gold, silver, tradable goods, or animals. They further stipulated that seeds must be provided jointly by the landlord and farmer. Thus, if one party provides the seeds and the other provides the land, the *muzāra<sup>c</sup>a* would be deemed defective. They based this ruling on the prohibition in Sunnah of leasing land for rent that it produces.<sup>18</sup>
2. Both parties must share equally in all inputs (excluding seeds) and outputs, otherwise the *muzāra<sup>c</sup>a* is deemed defective. After the partnership is binding, it is permissible for either party to donate an increased share in costs or profits if they so wish.
3. Both parties must provide the same type of seeds (e.g. wheat, barley, etc.). Thus, if one provides one type of seed and the other provides another, the *muzāra<sup>c</sup>a* is deemed defective, and each is entitled to the output of the genus he provided.

On the other hand, the majority of Mālikīs accepted the opinion of Mālik and 'Ibn Al-Qāsim that the seeds provided by the two parties need not be mixed physically or legally. Thus, they ruled in analogy to other property partnerships that even if the seeds provided by the two parties were separate, the partnership is valid.

<sup>16</sup>In *Al-Hidāyah*, the author states that the share of the one not providing seeds must be specified since he deserves a compensation according to contract conditions, which should thus be known. However, Qādī Zādah said regarding this condition that specifying the share of the one not providing the seeds is the important condition, but it is of no great significance to say that the other share does not need to be specified [since the two shares must add to one!, tr.], c.f. 'Ibn Al-Humām ((Ḥanafī), vol.8, p.34).

<sup>17</sup>Al-Dardīr ((Mālikī)A, vol.3, p.372 onwards), Al-Dardīr ((Mālikī)B, vol.3, p.494 onwards), 'Ibn Juzayy ((Mālikī), p.280).

<sup>18</sup>Narrated by 'Aḥmad, Al-Bukhārī, and Al-Nasā'ī on the authority of Rāfi' ibn Khudayj, c.f. Al-Shawkānī (, vol.5, p.275).



The Mālikī conditions of (i) both parties providing seeds of each genus, (ii) sharing equally in all other costs and in profits, and (iii) not paying rent out of the land's produce, are very strict conditions in disharmony with the realities of *muzāra<sup>c</sup>a* usage.

### Shāfi'ī conditions

The Shāfi'īs did not stipulate for valid *muzāra<sup>c</sup>a* (validated as a derivative of *musāqāh*) that contracting parties share equally in costs or output. In addition, they restricted the prohibition of leasing land with rents paid from its output to the case where the rent is specified as the output of a specific part of the land. In this regard, they defined *muzāra<sup>c</sup>a* as working land in exchange for a share of its produce, where the landlord provides the seeds.<sup>19</sup>

### Ḥanbalī conditions

The Ḥanbalīs ruled that it is permissible to conduct *muzāra<sup>c</sup>a* in exchange for part of the produce, and did not require equal sharing of the produce between the contracting parties. On the other hand, they agreed with the Shāfi'ī condition that the landlord must provide the seeds, even though one narration states that 'Aḥmad allowed the farmer to provide the seeds. They further ruled that the output shares must be specified in the contract, otherwise the *muzāra<sup>c</sup>a* is deemed defective. Finally, they ruled that the genus and amount of seeds must be known, since *muzāra<sup>c</sup>a* is a contract for work, and thus genus and amount must be known in analogy to lease and hire contracts.

In summary, the Ḥanafīs allow either party to provide the seeds, the Mālikīs require both parties provide the seeds, while the Shāfi'īs and Ḥanbalīs ruled that the landlord should provide the seeds and the farmer should provide his labor.

## 110.3 Types of *muzāra<sup>c</sup>a*

'Abū Yūsuf and Muḥammad considered four types of *muzāra<sup>c</sup>a*, of which they classified three as valid and one as invalid:<sup>20</sup>

1. One party may provide the land and seeds, while the other provides labor and livestock and other tools. The *muzāra<sup>c</sup>a* is valid in this case, considering the landlord an employer of the farmer, and the animals and tools are considered derivative of the hiring contract since they are tools required for the labor.
2. One party may provide the land, while the other provides labor, animals, and seeds. The *muzāra<sup>c</sup>a* is valid in this case as well, where the farmer is

<sup>19</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.323-325).

<sup>20</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.179 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.35 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.281 onwards), 'Ibn 'Abidīn ((Ḥanafī), vol.5, p.195 onwards), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.229 onwards).



viewed as a lessee of the land, and a portion of its output is considered rent.

3. One party may provide the land, animals, and seeds, while the other provides only labor. The *muzāraʿa* is valid in this case, whereby the landlord would have hired the farmer, with part of the produce paid as wages.
4. One party may provide the land and animals, while the other provides labor and seeds. The apparent ruling in this case is that the *muzāraʿa* is defective. If the contract is considered a lease of the land, then requiring the landlord to provide the animals for production would render it defective, since the animal cannot be made derivative to the land due to their different usufruct (land's usufruct is growth of plants, and animals' usufruct is work). On the other hand, if the contract is considered to be hiring the farmer, then requiring him to provide the seeds would render the contract defective, since the seeds cannot be derivative of his labor.

Similarly, the *muzāraʿa* is deemed defective if the landlord is required to provide tools, animals, or labor for production. It is also deemed defective if one of the parties is entitled to all of the produce. Finally, the contract is defective if the farmer is required to harvest and thresh the produce, or to provide transportation and storage thereof, since such actions are not conducive to producing a good crop.

## 110.4 Legal status

### 110.4.1 Valid *muzāraʿa* for the Ḥanafīs

The Ḥanafīs listed a number of legal status rulings for valid *muzāraʿa*.<sup>21</sup>

1. The farmer is responsible for all costs of producing a good crop (e.g. cost of seeds, protecting the crop, etc.), since such costs are covered by the contract.
2. All costs associated with the crop (e.g. fertilizers, removal of weeds and grass, plowing, threshing, etc.) must be borne by both parties in proportion to their shares of the produce.

In this regard, the Mālikīs ruled that the farmer is responsible for all costs including watering, plowing, transportation, threshing, and separation of grains. Then, the two parties would divide the net grains according to measures of volume.<sup>22</sup>

<sup>21</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.181 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.39), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.282), 'Abd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.2, p.231 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.199).

<sup>22</sup>*Al-Tāj wa l-'iklāl* (vol.3, p.177).



3. Produce must be divided according to the agreed upon ratios, following the Ḥadīth: “Muslims are bound by their conditions”.<sup>23</sup> Thus, if the land produces nothing, neither party would owe the other anything. The farmer in this case was a hired worker in exchange for a share of the non-existent output. Thus, this distinguishes this case from a defective *muzāra<sup>C</sup>a*, where the worker would be entitled to the market wage for his work if the land produces nothing. The difference is that the landlord’s obligation in a valid contract is what is named in the contract, in this case a share of nothing. In contrast, the landlord’s obligation in a defective *muzāra<sup>C</sup>a* is established as a liability for the market wage, which is not nullified by the non-existence of output.
4. We have seen that the *muzāra<sup>C</sup>a* contract is deemed non-binding by the Ḥanbalīs, and binding upon sowing the seeds by the Mālikīs. In contrast, the Ḥanafīs ruled that the contract is non-binding on the party providing the seeds, binding on the other party. Thus, they ruled that *muzāra<sup>C</sup>a* may only be voided if there is a valid excuse, as we discussed below.

Thus, if the provider of seeds decides not to work, he may not be forced to perform. However, if the party not providing the seeds decides not to work, the authorities may force him to do so. This ruling follows from the view that the contract does not harm the worker, and the latter in this case is bound by the contract in analogy to the case of being hired. The exception to this ruling is the case where a valid excuse that would allow the worker to void the hiring contract exists, in which case the same excuse would allow him to void the binding *muzāra<sup>C</sup>a*.

The distinction between the two parties based on who provided the seeds follows from the fact that the provider of seeds may only execute the contract by destroying his property (the seeds) in the land. Thus, he is not bound by the contract to sow the seeds, since no individual should be forced to destroy his property. In contrast, the other party does not destroy his property by performing his part of the contract, and thus the contract becomes binding upon him.

5. If one party is required by the contract to plow the land or water it, then honoring that condition is required. If no agreement was reached, then the parties are bound by conventional agricultural procedure. In this regard, if the land is watered by rain, no party may be forced to water it, otherwise watering responsibility is determined by convention. If one party to a valid *muzāra<sup>C</sup>a* was responsible for watering, and was delinquent in doing so to the point of destroying the crop, he would thus be required to compensate the other party, in analogy to other compensations for

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<sup>23</sup>A valid Ḥadīth narrated by Al-Ḥākim on the authorities of ‘Anas and ‘Ā’isha. It was also narrated by ‘Abū Dāwūd and Al-Ḥākim on the authority of ‘Abū Hurayrah, and narrated by Al-Tirmidhī and ‘ibn Mājah on the authority of ‘Amr ibn ‘Awf, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.112).



negligence in possessions of trust. On the other hand, no compensation is required if the *muzāraʿa* was defective.

6. It is sometimes permissible to increase or reduce the stipulated output shares to the two parties. The demarcation for permissibility in this case is that whatever may be possible at the contract's inception may be increased, and whatever is not possible may not be increased. In both cases, reduction is permissible, in analogy to increasing the price in a sales contract.

To illustrate: if the farmer provided the seeds then it is not permissible for him to increase the landlord's share after harvest relative to what was stated in the contract. This ruling follows since the increase in rent would thus have taken place after the conclusion of *muzāraʿa* and extraction of usufruct from the land. Thus, this increase is not allowed, since the contract cannot be initiated after harvest.

In contrast, if the farmer provided the seeds, and the landlord gave him a larger share of the output in the above case, the increase is permitted. The increase in this case is in effect a reduction in the rent to which the landlord is entitled, which does not require the object of the contract to be in existence.

On the other hand, if the landlord provided the seeds, and then decided to increase the farmer's share of the output after harvest, the increase would not be permitted. In this case, the contract is concluded, and its object (the farmer's labor) has been given in full. However, the farmer in this case is permitted to increase the landlord's share, as a reduction in the wages to which he is entitled.

Before harvest, any increase from either party in the other's share would be deemed permissible.

7. If one of the contracting party dies prior to harvest, the crop may be kept until harvest time. In this case, the other party is not required for any further compensation since the lease or hire contract would continue to the harvest time.

In summary, the landlord is responsible for two obligations: (i) giving the farmer access to the land and its easement and other associated rights, and (ii) maintaining the tools of tilling the land in good order. The farmer, on his part, is responsible for two corresponding obligations, which are: (i) taking care of the agricultural production process and bearing its conventional costs and labors (including plowing, watering, etc.), and (ii) preserving the land and crop in good condition.

#### 110.4.2 *Shāfiʿī* status rulings

We have seen that *Shāfiʿī*s only deem *muzāraʿa* (seeds provided by the landlord) permissible as a derivative of *musāqāh*. Moreover, we have seen that they do



not allow *mukhābara* (seeds provided by the farmer) as a derivative of *musāqāh*.

Thus, they ruled that if a land is made object of *muzāra<sup>c</sup>a* contract without an underlying *musāqāh* contract being in place, they ruled that the landlord is entitled to the entire produce, since it is a growth of his property. In this case the farmer is entitled to a compensation for the market wages for his labor, and rents for his animals, and tools.

In this regard, sharing the produce between the two contracting parties, with no wage or rental payments by either party to the other, may occur in one of two forms if the landlord provided the seeds:

1. The landlord may hire the farmer for a defined portion of the seeds as an unidentified share, where the farmer is responsible to plant the landlord's share in his land and is lent a corresponding share of the land to plant his own share. Then, the worker may work the land, and the output may be divided between them in proportion to the seeds. This is a combination of an employment contract and a loan contract.
2. The landlord may hire the farmer for a defined portion of the seeds as an un-identified share, as well as a defined portion of the land's usufruct as an un-identified share. Thus, the farmer would plant the landlord's portion of the seeds to utilize the un-paid portion of the usufruct, and then uses the paid portion of the usufruct to plant his own seeds.

Thus, the two parties would become partners according to the specified shares of the crop, and neither would owe the other an independent wage or rental payment. In this case, the farmer utilizes his portion of the usufruct in proportion to his portion of the seeds, and the landlord is entitled to the other portion. Therefore, this contract is a pure employment contract.<sup>24</sup>

If the farmer provided the seeds, then he may lease a specified portion of the land as an un-specified share, with the rent being paid as a known but unspecified common share in the seeds in addition to his own labor in the other share. Alternatively, the farmer may lease a portion of the land for a portion of the seeds, and volunteer his labor for the other portion of the land. In either case, each party would be entitled to his specified share in the produce in proportion to his ownership of seeds and usufruct of the land.

### 110.4.3 Defective *muzāra<sup>c</sup>a* rulings

The Ḥanafis stipulated the following legal status rulings for defective *muzāra<sup>c</sup>a*:<sup>25</sup>

1. The farmer is not obligated to perform any farming tasks, since such obligation would only arise from the contract, which is not valid.

<sup>24</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi<sup>c</sup>ī), vol.2, p.325).

<sup>25</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.182 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.39 onwards), Al-Zayla<sup>c</sup>ī ((Ḥanafī Jurisprudence), vol.5, p.282), 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, p.196), <sup>c</sup>Abd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.231).



2. All produce belongs to the provider of seeds, be it the landlord or the farmer. This ruling follows from the view that the output belongs to the one whose property produced it as a growth, and the defective contract conditions are irrelevant.

The Mālikīs and Ḥanbalīs agree with the Ḥanafīs in this ruling.<sup>26</sup>

3. If the landlord provided the seeds, the farmer is entitled to the market wage for his labor. On the other hand, if the farmer provided the seeds, then the landlord is entitled to the market rental rate for his land. In both cases, the contract is deemed a lease or employment.

In the first case, the landlord is entitled to all of the output, since it is a growth of his property (the seeds) in his property (the land). In the latter case, the farmer is only entitled to the equivalent of the seeds he sowed plus the equivalent of the market rent of the land, any excess must be given away in charity.

4. The market rent or wages are required obligations in defective *muzāraʿa*, even if the land produced nothing after its tilling. This ruling follows from the view that *muzāraʿa* is in fact a leasing or hiring contract, and rent or wages in such contracts are only made obligatory by virtue of usage of the property or labor. We have already covered the distinction between this case and the case of valid *muzāraʿa* (where no wage or rent payments are required) in item #3 of the legal status rulings of valid *muzāraʿa*.
5. The obligation for market rents or wages in a defective *muzāraʿa* are determined by 'Abū Ḥanīfa and 'Abū Yūsuf on the basis of what is estimated in the contract. They based this ruling on the view that the contract was concluded by mutual consent. Thus, the interests of both parties should be considered, especially since the worker by agreeing to the contract agreed to forfeit any excess of his wages over his named share.

In contrast, Muḥammad ruled that the going market wages or rents must be paid in full, regardless of amount. He based this ruling on the view that the rents or wages to be paid are compensations for the usufruct or labor, which were collected in full by virtue of a defective contract. Thus, the market value of the usufruct or labor must be paid, since it has no equivalent to be given as compensation.

#### 110.4.4 Mālikī rulings

The Mālikīs ruled that if a *muzāraʿa* contract was known to be defective prior to commencement of work, then the contract should be voided. On the other hand, they ruled that the contract should not be voided if its defectiveness is discovered later. In the latter case, the two parties should share the produce based on what each one provided in terms of land, labor, and seeds. If one

<sup>26</sup> Al-Dardīr ((Mālikī)A, vol.3, p.498), 'Ibn Qudāmah (, vol.5, p.392).



party provided two of the three inputs (land, labor, and seeds), then he would be entitled to the full produce, and the other is entitled to the market wage or rental for his one input if it is labor or land, respectively, and the equivalent amount of seeds if seeds are all that he supplied.<sup>27</sup>

## 110.5 Termination and voiding

A *muzāra<sup>c</sup>a* may be terminated after it has served its purpose. On the other hand, it may be terminated earlier than that. The Ḥanafīs listed the following conditions for such termination of a *muzāra<sup>c</sup>a*.

### 110.5.1 Expiration

A *muzāra<sup>c</sup>a* may end when its contract period elapses. This is the default meaning of contract voiding.<sup>28</sup> In this case, if the crop is harvested at the end of the contract period, and each of the contracting parties collects his share according to the agreement, the contract would end without any problems. On the other hand, if the contract period expired before the crop was harvested, the farmer must continue to work until the crop is harvested, to safeguard the interests of both parties to the extent possible, in analogy to the hiring contracts.

In the latter case, the farmer is responsible for the market rental of his share in the land, until the crop is harvested, in analogy to the lease contract. This ruling follows from the fact that he is utilizing the usufruct of part of the land to grow his share of the crop. During that period, all expenses (including crop protection and watering costs) must be borne by both parties in proportion to their shares in the crop. This ruling follows from the fact that the contract is terminated when its stipulated period elapsed. Thus, while the farmer was responsible for such costs while the contract was intact, both parties have to share the costs after the contract's termination, since the crop is jointly owned.

This ruling is contrasted with the case where one of the parties dies prior to harvest, in which case the crop is kept until the harvest time, but the farmer must continue to bear all associated costs. This ruling followed from the Ḥanafīs' determination based on juristic approbation that the lease contract should remain intact for its duration. Thus, the farmer or his heir should continue the work. In contrast, in the case of contract expiration when its stipulated period elapses, it is not possible to keep the contract intact.

### 110.5.2 Death of one party

The Ḥanafīs and Ḥanbalīs ruled *muzāra<sup>c</sup>a* contract is terminated or voided upon the death of one of its party, in analogy to the ruling for leases and hiring

<sup>27</sup> *Sharḥ Majmū<sup>c</sup> Al-'Amār* (vol.2, p.178), *Al-Taqnīn Al-Mālikī* (item #464), 'Ibn Juzayy ((Mālikī), p.281).

<sup>28</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.184), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.43), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.232), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.197).



contracts.<sup>29</sup> This ruling applies regardless of whether the death occurs before or after the seeds are sown, and before or after harvest.

In the event that the landlord dies prior to harvest, the farmer or his heir is deemed responsible for continuing the work, since the latter is responsible for seeing the crop through until its harvest. As we have seen previously, the contract is maintained in this case based on juristic approbation, until the crop is harvested. In this case, the farmer is not liable to pay rent for the land. Then, upon harvest, the contract is voided for its remaining duration, since there would be no necessity to maintain it. Thus, maintenance of the contract was predicated upon the preservation of both parties' interest in seeing the crop through to harvest, which also required the continuation of work by the farmer or his heir.

In contrast, the Mālikīs and Shāfi'īs ruled that a *muzāra'a*, unlike *'ijārah* is not terminated upon the death of one of its parties.

### 110.5.3 Voiding based on a valid excuse

A *muzāra'a* is terminated if the contract is voided prior to becoming binding on either party. In this regard, we have seen that the Ḥanafīs ruled that the provider of seeds is not bound to the *muzāra'a* by virtue of the contract. We have also seen that the Mālikīs ruled that a *muzāra'a* only becomes binding upon commencement of the farmer's work, and the contract may be voided before that.

The Ḥanafīs ruled that either party may void a *muzāra'a* after it becomes binding, provided that he has a valid excuse. The list of valid excuses that allow such voiding of a binding *muzāra'a* include:<sup>30</sup>

1. If the landlord is afflicted by a massive debt that requires him to sell the land of the *muzāra'a* contract to meet his obligations, then he may void the contract and sell the land, in analogy to the ruling in leases. This ruling follows from the fact that the contract can only be maintained in this case by exposing the landlord to significant harm. Thus, to avoid this harm, the judge may sell the land to repay its owner's debt first, and then void the *muzāra'a*. However, the *muzāra'a* is not automatically voided by virtue of the excuse itself.

In this regard, if at all possible, it is better to void the contract either before the commencement of farming, or after harvest. However, if it is not possible to void the contract because a crop already exists but is not ready for harvest, then the land should not be sold, and the contract should not be voided, until after the harvest. This ruling follows from the fact

<sup>29</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.184), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.42), °Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.232), 'Ibn °Ābidīn ((Ḥanafī), vol.5, p.198), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.282), 'Ibn Qudāmāh (, vol.5, pp.568,572).

<sup>30</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.183 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.42), 'Ibn °Ābidīn ((Ḥanafī), vol.5, p.196 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.282), °Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.232).



that selling the land voids the farmer's right, while delaying the land sale until harvest time is a mere postponement of the creditor's right. Thus, postponement of a right is more appropriate than the terminal voiding of another, as the lesser of two evils when considering the rights of all concerned parties.

In cases where the contract is voided and there is a need to compensate the farmer legally (for his work), the Ḥanafīs stipulated three compensation schemes for three sets of circumstances:

- (a) If the contract is voided after the farmer had plowed the land and dug ditches, then the farmer is not entitled to any compensation for his work. In this case, the farmer's work is only counted against the landowner by virtue of the contract, and the latter pertains to the land's produce, which had never materialized. However, this legal ruling does not absolve the landlord of his religious obligation before Allāh to compensate the farmer for his work.
  - (b) If the crop had begun to grow, but was not ready for harvest, the land should not be sold in lieu of the debt until the crop is harvested. This ruling follows from the above mentioned view that postponing the creditor's right of repayment is better than voiding the farmer's right in the crop.
  - (c) If the farmer had planted the crop, but the crop had not yet sprung, the Ḥanafī scholars differed regarding the possibility of selling the land to repay a large debt and thus void the contract. In this case, some scholars ruled that the landlord in this case is allowed to sell the land, since the provider of the seeds in this case has no established property associated with the land. In this regard, they ruled that planting of the seeds is tantamount to their destruction, thus rendering the seeds non-property, and the land may be sold. In contrast, some other scholars ruled that planting the seeds increases their property value (rather than destroys them), and thus the farmer has an established property inside the land, which thus may not be sold until harvest time. Perhaps the latter is the chosen opinion of the author of *Al-Hidāyah*.
2. If the farmer becomes sick and unable to work, needs to travel away from the land, or needs to change professions to sustain his family, or if he cannot work due to joining the army in the way of Allāh, then he is excused from his obligations in analogy to the case of being hired, necessity due to theft, etc. Thus, the contract may be voided.

In this case, the Ḥanafīs differed in this case whether the voiding requires a court order, or mutual consent. Some ruled that it is necessary to have a court order or mutual consent to void *muzāra<sup>c</sup>a*, in analogy to the ruling for *'ijārah*. However, the majority of Ḥanafīs ruled that the *muzāra<sup>c</sup>a* may be unilaterally voided in this case, without need of a court order of mutual consent.



# Chapter 111

## *Musāqāh* or *Mu<sup>c</sup>āmalah*

In this chapter, we shall discuss the *musāqāh* contract with regards to its definition, legality, cornerstones, type of eligible trees, differences from *muzāra<sup>c</sup>a*, conditions, and legal status.

### 111.1 Definition, legality, cornerstones, and source

#### 111.1.1 Definition of *musāqāh*

*Musāqāh* is literally derived from the Arabic verb *saqā* (to water), and the people of Madīnah called it *mu<sup>c</sup>āmalah*. It refers legally to giving a worker access to trees that he maintains and waters, with the fruits being shared between the owner of the trees and the worker. In other words, it is a contract exchanging work for a specified ratio of the output of trees. The Shāfi<sup>c</sup>is restricted the contract specifically for palm trees and grapevines, whereby the worker will maintain the palms or vines and water them, and share the fruits with the owner.<sup>1</sup>

#### 111.1.2 Legality

The Ḥanafīs' rulings for *musāqāh* are identical to their rulings for *muzāra<sup>c</sup>a* as pertaining to legal status, differing opinions, and permissible conditions. Thus, 'Abū Ḥanīfa and Zufar ruled that the contract is invalid, since it constitutes a version of the forbidden leasing of agricultural land for part of its output. Their proof is the Ḥadīth: "Whoever owns land, let him plant it, and let him not lease it for a third or a quarter of its output, or for a named amount of food".<sup>2</sup>

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<sup>1</sup>Al-Zayla<sup>c</sup>ī ((Ḥanafī Jurisprudence), vol.5, p.284), Al-Kāsānī ((Ḥanafī), vol.6, p.185), 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, p.200), <sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.233), 'Ibn Juzayy ((Mālikī), p.279), Al-Khaṭīb Al-Shirbīnī ((Shāfi<sup>c</sup>ī), vol.2, p.322), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.523).

<sup>2</sup>Narrated by Al-Bukhārī and Muslim on the authority of Rāfi<sup>c</sup> ibn Khudayj. However, it is a very controversial Ḥadīth, c.f. 'Ibn Qudāmah (, vol.5, pp.383,385).



In contrast, 'Abū Yūsuf, Muḥammad, and the majority of jurists including Mālik, Al-Shāfi'ī, and 'Aḥmad, ruled that *musāqāh* is permissible subject to certain conditions. Their proof was the dealing of the Prophet (pbuh) with the people of Kḥaybar, as narrated by the major narrators on the authority of 'Ibn 'Umar: "The Messenger of Allāh (pbuh) dealt with the people of Kḥaybar for a specific portion of their output of fruits. They also reasoned based on people's need for such contracts, since the owner of trees may need a worker to tend his trees, and the worker may need the owner to provide him that work.

In this regard, the majority of Ḥanafīs accepted the opinion of 'Abū Yūsuf and Muḥammad. They based their ruling on the Prophet's (pbuh) dealings, and the dealings of his wives, Guided Caliphs, and the people of Madīnah, as well as the consensus of his (pbuh) companions' on the permissibility of *musāqāh*.<sup>3</sup> Thus, the Mālikī jurist 'Ibn Juzayy stated that the contract is permissible as an exception to two forbidden contracts from which it is derived: (i) a lease with unknown rent or work with unknown wages, and (ii) a sale of objects prior to their creation.<sup>4</sup>

### 111.1.3 Cornerstone

- The Ḥanafīs ruled that the cornerstones of *musāqāh* are offer and acceptance, as they ruled for *muzāra'ah*. The offer in this case is made by the tree owner, and acceptance is issued by the worker. The object of sale in this case is deemed to be unequivocally the worker's labor, in contrast to the case of *muzāra'ah*.
- The Mālikīs ruled that *musāqāh* becomes binding based on contract language, rather than the commencement of work.
- The Ḥanbalīs ruled that *musāqāh*, like *muzāra'ah*, does not require a verbal acceptance, and the worker's commencement of work is sufficient to imply acceptance, in analogy to agency.
- The Shāfi'īs ruled that verbal acceptance is required in the *musāqāh* contract, without necessarily listing all the activities for which the worker is responsible.

Details that are not specified in the contract language are deemed to be implied by predominant conventions.<sup>5</sup>

- The non-Ḥanbalī jurists deemed *musāqāh* to be a binding contract. Thus, they ruled that neither party is allowed to void the contract after its conclusion without the other's consent.<sup>6</sup>

<sup>3</sup>'Ibn Qudāmah (, vol.5, p.384), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.45 onwards), Al-Kḥaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.322 onwards).

<sup>4</sup>'Ibn Juzayy ((Mālikī), p.279), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.242).

<sup>5</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.185), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.528), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.1, p.247), Al-Dardīr ((Mālikī)A, vol.3, p.712), Al-Kḥaṭīb Al-Shirbīnī ((Shāfi'ī), p.328).

<sup>6</sup>Al-Dardīr ((Mālikī)A, vol.3, p.713), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.284), Al-Kḥaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.328), 'Ibn Qudāmah (, vol.4, p.372 onwards).



#### 111.1.4 Eligible trees

##### Ḥanafī rulings

The Ḥanafīs ruled that the type of trees eligible for *musāqāh* are fruit-bearing trees.<sup>7</sup> Thus, they validated *musāqāh* for palm trees, grapevines, clover, fruit-bearing trees, and the roots of eggplant. They based this ruling on the view that the contract is legalized to meet a need, which applies to all such plants. Later Ḥanafīs also allowed *musāqāh* for non-fruit-bearing trees such as willow trees and trees grown for their wood, since such trees also require watering and maintenance. On the other hand, they ruled that any trees that do not need watering and maintenance are not eligible for *musāqāh*.

##### Mālikī rulings

The Mālikīs allowed *musāqāh* for grains, beans and nuts as well as permanent and fruit-bearing trees such as palms, grapevines, and apple trees, subject to two conditions:<sup>8</sup>

1. The contract must be concluded prior to the fruit's ripening and permissibility of its sale, and the tree must not be one that can grow offspring (e.g. like banana and fig trees). In the latter case, the trees can only be subject to a *musāqāh* contract as derivative of another.
2. The term of the contract must be specified, even if for years, but it is not permissible for the term to be too many years. The maximum allowable period is determined by convention to be a period sufficiently long for trees and areas to change substantially. This ruling is made in analogy to the case of *'ijārah*, to avoid potential harm. Moreover, the contract is not allowed if the area subject to the *musāqāh* contract changes substantially one year after the next.  
  
 'Ibn Al-Qāsim further stipulated that the contract must use the term "*musāqāh*" to deem the contract valid. He further allowed *musāqāh* in plants with no fixed root (e.g. watermelons) subject to four conditions; the two listed above plus:
3. The contract must be concluded after the plant is observable above the ground.
4. The plant's owner must be unable to tend to the plants and water them himself.

They also ruled that the portion of the fruits given to the worker in compensation for his work must be an unspecified but fixed common ratio of the overall

<sup>7</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.186), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.47), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.200 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.284), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.234).

<sup>8</sup> 'Ibn Juzayy ((Mālikī), p.279), Al-Dardīr ((Mālikī)A, vol.3, pp.713-718), 'Ibn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, pp.243-246).



fruits of the garden. Thus, it is not valid to specify the payoff as the fruits of a specific group of trees, or a specific amount of fruit. Finally, the ratio must be specified explicitly.

### Ḥanbalī rulings

The Ḥanbalīs ruled that *musāqāh* is only valid for trees with edible fruits.<sup>9</sup> Thus, they ruled that it is not valid for non-fruit-bearing trees such as willow trees, rose trees, etc.

### Shāfi<sup>c</sup>ī rulings

The Shāfi<sup>c</sup>īs ruled in the new opinions of the school that *musāqāh* is only valid for palm trees and grapevines.<sup>10</sup> They based the permissibility for palm trees on the above mentioned Ḥadīth in Al-Bukhārī and Muslim that the Prophet (pbuh) dealt accordingly with the people of Kḥaybar. They also ruled thus for grapevines since they are treated in the same manner in matters of *zakāh*. On the other hand, Al-Shāfi<sup>c</sup>ī in his old school permitted the contract for all fruit-bearing trees.

#### 111.1.5 *Musāqāh vs. muzāra<sup>c</sup>a*

The Ḥanafīs ruled that *musāqāh* is similar to *muzāra<sup>c</sup>a* except for four issues:<sup>11</sup>

1. If either contracting party decides not to fulfill his obligations under the contract, he must be forced to perform unless continuation of the contract causes him a loss. This is in contrast to *muzāra<sup>c</sup>a*, where the provider of seeds may decide not to perform prior to sowing the seeds, and he may not be forced to continue with the contract to avoid his loss of the seeds. Moreover, *musāqāh* is deemed a binding contract for the non-Ḥanbalīs, while *muzāra<sup>c</sup>a* is deemed to be binding only after the seeds are sown.

In this regard, the Ḥanbalīs stated that agency, silent partnerships, *musāqāh*, *muzāra<sup>c</sup>a*, deposits, and promises of gifts are non-binding on either party, and thus may be voided unilaterally by either.<sup>12</sup>

2. A *musāqāh* continues after its contract period expires, letting the worker work without obliging him to pay rent. Thus, the worker may continue to work until he collects the fruits, without having to pay rent to the tree-owner after the expiration of the contract period. This ruling follows from the Ḥanafī view that trees are not eligible for rent, and since the worker is responsible for all labor input. In contrast, the case of a *muzāra<sup>c</sup>a* for

<sup>9</sup> Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.523).

<sup>10</sup> Al-Kḥaṭīb Al-Shirbīnī ((Shāfi<sup>c</sup>ī), vol.2, p.323), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi<sup>c</sup>ī), vol.1, p.390).

<sup>11</sup> 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, p.201), Al-Zayla<sup>c</sup>ī ((Ḥanafī Jurisprudence), vol.5, p.284).

<sup>12</sup> Mar<sup>c</sup>ī ibn Yūsuf (1st printing (Ḥanbalī), vol.3, p.154), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.528 onwards), 'Ibn Qudāmāh (, vol.5, p.372 onwards).



which the period had expired requires the worker to pay the landlord a rent for the share of land proportional to his share of the output. In the latter case, the land can be leased, and it is an input in the production process, and thus the landlord is entitled to the rent of the portion of the land corresponding to the output that belongs to the worker. In this latter case, the worker is not obligated to work on the portion of the land corresponding to the landlord's share of the output after the expiration of the contract.

3. If fruit-bearing palm trees are found to belong to an individual other than the landlord, the worker may demand compensation for the market value of his share of the fruits. In this case, the worker's wages become a non-fungible part of the trees, and thus he may demand the market value of the non-fungible entitlement which was found to be in the property of a third party. On the other hand, if the trees produced no fruits, then the worker is not entitled to any compensation. In contrast in the case of *muzāraʿa*, if the land is found to belong to a third party after planting the crop, the worker may demand his share of the plants. However, if the land is found to belong to another after the worker commenced his labor but prior to planting the crop, then the farmer is not entitled to any compensation for his work.
4. Jurists ruled based on juristic approbation that specification of the period of a *musāqāh* contract is not required. Thus, they relied on conventional knowledge of the usual period needed for fruits to grow, which is usually known with a sufficient degree of precision. This is in contrast to the case of farming, where harvest times vary with the time of sowing seeds.

In the case of *muzāraʿa* contract, we have seen that the original opinions in the Ḥanafī school was the necessity of specifying the contract period, but that the accepted later opinion is not to stipulate that as a condition of validity.

The Ḥanafīs and Shāfiʿīs staid that *musāqāh* and *muzāraʿa* are considered leases at their inception, and partnerships at their conclusion. Similarly, the Ḥanbalīs found *musāqāh* to be a sub-category of silent partnerships (*muḍāraba* contracts).<sup>13</sup>

## 111.2 Contract conditions

### 111.2.1 Ḥanafī conditions

All the relevant conditions of *muzāraʿa* apply to *musāqāh*. Thus, there are no conditions in *musāqāh* relating to the (i) genus of seeds, (ii) providers of said seeds, (iii) fertility of the land, or (iv) specification of the contract period. The rest of the eight conditions of *muzāraʿa* do apply to *musāqāh*: (v) eligibility

<sup>13</sup> Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.529).



of contracting parties, (vi) specification of the worker's share in output, (vii) giving the worker access to the trees, and (viii) partnership in the output. The final condition includes the stipulation that the worker's portion of the output must be a common share thereof.<sup>14</sup>

We may state the conditions of *musāqāh* in more detail as follows:<sup>15</sup>

1. Eligibility: The two contracting parties must be sane and discerning. In this regard, the Ḥanafis also required contracting parties to be of legal age, while the other schools did not stipulate that condition.
2. Object of the contract: The trees for which *musāqāh* is contracted must be fruit-bearing. Disagreements over this condition were listed in detail above. Moreover, the trees must be known to all parties.
3. Access: The worker must be given full access to the trees made subject to a *musāqāh* contract. Thus, if a condition is stipulated that both parties should tend to the trees, the contract would be deemed defective for violating the full access condition.
4. The output must be jointly owned by the two parties, with the share of each being a common share specified as a known percentage of the whole. Thus, the contract would be deemed defective if all of the output is given to one party, if one party is guaranteed a fixed amount, or if the ratios for sharing were unspecified.

We have seen that the Ḥanafis ruled according to juristic approbation and based on convention that the period of a *musāqāh* contract need not be specified. In this regard, convention dictates that the period of *musāqāh* ends with the first ripening of fruits in that year. In clover and similar crops, the period of *musāqāh* is considered to last until the first cut. If an entire year/season passes without the tree producing any fruits, the *musāqāh* would be deemed defective.

Moreover, the *musāqāh* would be considered defective if it stipulates a contract period too short for bearing and ripening of fruits. In this case, the intent of the partnership (the fruits) would not exist during the contract period. This is in contrast to the case of a valid contract for which the trees do not bear fruits within the otherwise acceptable period. In the latter case, neither party owes the other anything, but the contract continues to be deemed valid.

If the contract specifies a period which may and may not be sufficient for the fruits to grow and ripen, then the fruits should be distributed according to the contract ratios if they appear, otherwise the *musāqāh* is deemed defective. In the latter case, the worker would be entitled to the

<sup>14</sup> Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.201).

<sup>15</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.185 onwards), Ibn Al-Humām ((Ḥanafī), vol.8, p.47), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.284).



market wage rate for his work due to the contract defectiveness discovered when its period is found to be too short.

In contrast, we have seen above that the Mālikīs ruled that the period of *musāqāh* must be known, in analogy to their ruling for *'ijārah*.

### 111.2.2 Non-Ḥanafī *musāqāh* cornerstones

The Shāfi'īs, Ḥanbalīs, and Mālikīs listed five cornerstones for the *musāqāh* contract: (i) two contracting parties, (ii) object of tending and watering, (iii) fruits, (iv) work, and (v) contract language.<sup>16</sup>

#### 1. Contracting parties

Anyone who is able to deal on his own behalf (i.e. sane and of legal age) may participate in a valid *musāqāh* contract. This ruling follows from the fact that *musāqāh* is a commutative contract compensated with property. Thus, it is analogous to silent partnerships, and the same eligibility criteria for engaging in sales must be applied. If the benefits of a child, an insane person, or a mentally incompetent person were to dictate engaging in a *musāqāh* contract, his guardian may engage in this contract on his behalf.

#### 2. Object of watering and tending

The Shāfi'īs restrict valid objects to be named in the *musāqāh* contract to palm trees and grapevines. The Ḥanbalīs allow *musāqāh* for all planted and observable trees with edible fruits. The worker would thus water and tend to the trees for a known portion of the fruits as a common share of the total produce. As we have seen, the contract would be deemed invalid if the trees made object of *musāqāh* were unknown.

#### 3. Fruits

All fruits must be distributed between the owner of the trees and the worker, and no portion may be given to a third party. Moreover, they should each have a non-zero and known share of the total fruits, in analogy to silent partnerships.

The Ḥanbalīs, and the majority of Shāfi'īs ruled in this regard that *musāqāh* is only valid if the fruits are observable but not yet ripened. Thus, it is not permissible to have a *musāqāh* contract to plant small palms and share them with the owner. Thus, *musāqāh* requires a fixed capital of trees to already be in place, and planting such trees would not be part of the labor of *musāqāh*.

It is permissible to engage in a multi-year *musāqāh* contract (e.g. for five years if fruits are expected to appear on the fifth year) even if there are no expected fruits for the first few years, provided that the trees are already planted

<sup>16</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.323-328), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, pp.390-392), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.523-529), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, pp.183-185), 'Ibn Qudāmah (, vol.5, pp.368,372 onwards, 375,380).



at the inception of the contract. Then, if no fruits grow through the entire multi-year period, the worker is not entitled to any compensation, in analogy to a one-year *musāqāh* for fruit-bearing trees that do not bear fruits that year.

However, if the specified period of *musāqāh* is too short for fruits to occur customarily, then the jurists of all schools deem the contract defective due to lacking a compensation for the worker. This ruling is *mae* in analogy to *musāqāh* for non fruit-bearing trees.

#### 4. Work

The worker must provide all the labor, and must be given full access to the trees to work as he sees fit. Thus, if the owner retains the right to work with the worker or to retain joint possession of the orchard, the contract is deemed defective. The contract would also be deemed defective if the worker is required to perform tasks not commonly considered part of *musāqāh* (e.g. digging a well). The latter ruling follows from the fact that the unconventional work thus required would constitute a hire contract with an unknown wage, as well as stipulating one contract as a condition in another contract.

The Shāfi'is also ruled that the amount of work must be known by stipulating the contract period for a year or more. They further ruled that there is no upper limit on the number of years that may be specified provided that the trees continue to exist and yield fruits, but a minimum period that would normally allow fruits to grow is required. Thus, they consider the contract invalid if its period is unspecified, made indefinite, or made too short for the trees customarily to produce fruits. They ruled thus since they consider *musāqāh* a binding contract, and thus require its period to be specified in analogy to the hire contract. On the other hand, the majority of Shāfi'is also ruled that it is not permissible to specify the contract period as whatever period is sufficient for fruits to grow, since that makes its period uncertain.

In contrast, the Ḥanbalīs ruled that the period of *musāqāh* and *muzāra'a* need not be specified. They ruled thus based on the fact that the Prophet (pbuh) did not specify a period for his dealing with the people of Khaybar, and his Caliphs followed the same practice after his death. Moreover, they reasoned that *musāqāh* and *muzāra'a* are permissible but non-binding contracts, and thus either party may void the contract whenever he wishes. However, the Ḥanbalī jurist 'Ibn Qudāmah ruled that *musāqāh* is a binding contract, and thus required its period to be specified, in analogy to *'ijārah*.

In this regard, he agreed with the Shāfi'ī ruling that there is no upper limit on the contract period to be specified (provided that the trees continue to exist and yield fruits that long), but a minimum period is required to ensure growth of fruits.

#### 5. Contract language

The contract language must contain an offer that specifies either the name of *musāqāh* or its substance: giving the worker access to the trees so that he may



water them and tend to them, and in return earns a known percentage of the fruits.

However, the majority of Shāfi'īs ruled that the *musāqāh* is invalid if the offer uses the name of *'ijārah*, since the latter is a different explicitly defined contract. In contrast, the Ḥanbalīs ruled that the contract is valid whether the offer utilizes the name *musāqāh*, *mu'āmalah*, *mufālahah*, or *'ijārah*. The Ḥanbalīs also deemed a *muzārah* valid if the offer uses the name of *'ijārah* (leasing the land for a known percentage of its output as a common share of the total), since they said that the essence of the contract is what matters. In this regard, any name may be used if that essence of the contract is understood, in analogy to sales (*bay'*), which is also deemed valid under the name of *mu'āṭah*.

The Shāfi'īs further require the worker to accept the offer verbally, or by sign language or writing for a mute, without necessarily listing all the specific tasks for which the worker is responsible. They based this ruling on their requirement of an explicit acceptance in hiring contracts. With regards to the details of the worker's responsibilities, those need not be spelled out in the contract, since they are known by convention.

In contrast, the Ḥanbalīs ruled that *musāqāh* and *muzārah* do not require an explicit or verbal acceptance. Thus, they ruled that commencement of work is sufficient to conclude the contract as an implicit acceptance, in analogy to their ruling in agency contracts.



# Chapter 112

## Legal Status

A *musāqāh* that satisfies all of its conditions is valid. Otherwise, the *musāqāh* is deemed defective. In this chapter, we shall discuss in details the legal status rulings for valid *musāqāh* and those for defective *musāqāh*.

### 112.1 Valid *musāqāh* rulings

#### 112.1.1 Ḥanafī rulings

The Ḥanafīs made the following rulings regarding the legal status of a valid *musāqāh*:<sup>1</sup>

1. The worker is responsible for all the tasks associated with *musāqāh*, including all maintenance of trees, vines, bulbs, watering ditches, pollination, etc. All such acts are derivative of the object of the contract, which is the worker's labor.

In contrast, all financial expenses that benefit the trees, e.g. plowing the land, treating the trees for infections, etc., must be borne by both parties in proportion to their output entitlement. This sharing follows from the fact that such expenses are not covered by the object of the contract.

2. Output must be shared according to the agreed-upon ratio.
3. If the trees do not produce any output, neither party owes the other anything.
4. The contract is binding upon both parties. Thus neither party is allowed to refrain from performing or to void the contract unilaterally, unless he has a valid excuse. This ruling is in contrast to the case of *muzāraʿa*, which the Ḥanafīs ruled to be non-binding on the provider of seeds.

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.187).



5. The landlord has the right to force the worker to perform if the latter has no valid excuse.
6. Increase and diminution of the output shares may be allowed according to the same rules established for *muzāraʿa*: that increases are allowed for cases that could be established at the inception of the contract, and diminution is allowed in both cases.

Thus, if fruits had not yet reached full size, then either party is allowed to increase the share of the other, since the contract would allow for the higher ratio at its inception. If the fruit had reached full size, then the worker may increase the share of the landlord, but the latter is not allowed to increase the share of the former. This ruling follows since the worker may reduce his wages, regardless of what is permissible at the inception of the contract. On the other hand, the landlord cannot increase the worker's wages after the work is done, since the object of the contract no longer exists after the fruits reach their full size.

7. The worker in a *musāqāh* is not allowed in turn to subcontract by engaging in a secondary *musāqāh* with a third party, unless the landlord explicitly allowed him to do so. Thus, if the worker were to subcontract without the landlord's permission, all fruits would belong to the owner of the trees, the first worker would not be entitled to any compensation, and the second worker is entitled to demand compensation for his market wages from the first worker.

### 112.1.2 Mālikī rulings

The Mālikī rulings for the legal status of a valid *musāqāh* largely agree with the Ḥanafī rulings. In this regard, the Mālikīs considered three aspects of work in an orchard:<sup>2</sup>

1. Work that does not relate to the fruits is not binding upon the worker by virtue of the contract, and thus it is not permissible to stipulate performing such work as a condition of the contract.
2. The worker is also not required to perform any work that relates to the fruits, but establishes capital that remains after their growth, e.g. digging a well or spring, erecting a watermill, building storage structures, or planting trees. Conditions of performing such tasks are also not permissible in *musāqāh*.
3. Otherwise, the contract obliges the worker to perform all tasks pertaining to the fruits that do not build permanent capital. Thus, he is responsible for pruning, watering, providing tools and animals, and bearing any expenses that are normally required in tending to trees. In this regard, the

<sup>2</sup>Ibn Juzayy ((Mālikī), p.279), Al-Dardīr ((Mālikī)A, vol.3, p.717 onwards), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.244 onwards).



worker is not automatically obliged in *musāqāh* to fortify an existing wall or fix a water ditch, but it is permissible to stipulate in the contract that he is responsible for such simple tasks.

In return, the worker is entitled to a determined percentage of the fruits as agreed upon in the contract. In this regard, the Mālikīs ruled that it is permissible to specify that all of the fruits belong to the worker.

If the trees produce no fruits, then neither party owes the other anything. In this case, the non-existence of fruits is considered to have occurred due to natural causes, rather than a defect in the contract.

Finally, they ruled that it is not permissible for either party to stipulate an extra side payment (e.g. in monetary terms) in addition to his share of fruits.

### 112.1.3 Shāfiʿī and Ḥanbalī rulings

The Shāfiʿīs and Ḥanbalīs agreed largely with the Mālikīs with regards to the worker's duties and rights under the contract. In this regard, they ruled that any work that must be repeated each year is the worker's responsibility, while any work that is not repeated annually is the landlord's responsibility.<sup>3</sup> Thus, the worker would be responsible for all annual tasks for growing fruits, such as watering, cleaning water sources, pollination, removal of weeds, picking the ripe fruits, etc. The majority of Shāfiʿīs also considered drying the fruits part of the responsibility of the worker, since it sustains the fruits.

In contrast, all tasks that aim primarily to sustain the trees, and that are not necessarily repeated annually, would not be the worker's responsibility. Such tasks include building walls around the orchard, digging new ditches, fixing doors, etc. The expenses for all such tasks must be borne by the landlord, as dictated by convention. The owner is also responsible for agricultural taxes if his orchard is subject to the *kharāj* tax.

It is noteworthy that the Mālikīs, Shāfiʿīs, and Ḥanbalīs ruled that picking the fruits is the worker's responsibility. In contrast, the Ḥanafīs ruled that picking the fruits is the joint responsibility of the worker and the landlord in proportion to their entitlements to fruits.

### Bindingness

The Shāfiʿīs, Ḥanafīs, and Mālikīs ruled that *musāqāh* is a binding contract on both parties. In contrast, the Ḥanbalīs ruled that it is not binding.<sup>4</sup> The Ḥanbalīs based this ruling on the narration of Muslim on the authority of ʿibn ʿAbbās that the Prophet (pbuh): “we will accept this arrangement of as long as we wish”. This distinguishes *musāqāh* from *muzāraʿa*, since the latter was

<sup>3</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.328 onwards), ʿAbū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.392), ʿIbn Qudāmah (, vol.5, p.369 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.528-531).

<sup>4</sup> Al-Dardīr ((Mālikī)A, vol.3, p.713), ʿIbn Qudāmah (, vol.5, pp.372, 376), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.528), ʿIbn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, p.247).



deemed binding according to the Ḥanafīs and Ḥanbalīs, and binding upon sowing the seeds for the Mālikīs.

According to the majority ruling that *musāqāh* is binding (the Shāfiʿī is also ruled the same way for *muzāraʿa* as a derivative contract), if the worker escapes prior to finishing his work, and the landlord volunteered to bear the cost of finishing it, the worker's entitlement to fruits is maintained. This ruling follows by analogy to the case of a third party volunteering to pay someone's debt. On the other hand, if the landlord does not volunteer to bear the cost of finishing the work, the ruler may hire someone to finish it, and charge the cost to the worker. If resorting to the authorities is not possible or denied, the landlord may bear the costs of finishing the work, declaring in front of witnesses that he intends to demand compensation for such expenses from the worker.

In contrast, the Ḥanbalīs ruled that if the worker escapes prior to finishing the work, the landlord is allowed to void the contract. This follows from their classification of the contract as non-binding.

### Worker possession

In *musāqāh*, *muzāraʿa*, and *mughārasah*, the worker's possession is a possession of trust. Thus, if he claims that part of the fruits, plants, or trees were destroyed without his transgression or negligence, his claim is accepted if supported by his oath. This claim is accepted if supported by the worker's oath, even if the landlord charges him with transgression or negligence, as per the rules of possessions of trust.

## 112.2 Defective *musāqāh* rulings

A *musāqāh* contract may be deemed defective if any of its legal conditions is not met. In what follows, we list the legal rulings of defective *musāqāh* contract.

### 112.2.1 Ḥanafī rulings

The following is a Ḥanafī listing for the most important cases of defective *musāqāh*:<sup>5</sup>

1. If all of the output is designated for one of the contracting parties, the essence of partnership would be absent, and the contract is defective.
2. If one of the parties is promised a fixed amount of fruit (e.g. half a pound), or promised any compensation other than a portion of the fruits (e.g. a financial compensation), the contract is defective since *musāqāh* is only a partnership in the fruits.

<sup>5</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.186), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.47 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.285), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, pp.202, 205), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.234).



3. If the contract stipulates that the landlord must participate in the work, the worker thus does not have full access to the trees, and the contract is deemed defective.
4. If the worker is required by the contract to cut the fruits, the contract is deemed defective. This follows from the Ḥanafī ruling that picking the fruits is not part of *musāqāh*, and not conventionally considered to be part thereof. Thus, their default ruling is that all work prior to ripening of the fruit (e.g. watering, pollination, protection, etc.) must be performed by the worker, but work after ripening (e.g. picking and storage) is the responsibility of both parties.
5. Similarly, if the contract requires the worker to transport or store the fruits after they are divided between the two parties, the contract is defective since that is not part of the recognized set of *musāqāh* tasks.
6. Requiring the worker to perform any tasks that benefit the landlord after the end of *musāqāh* (e.g. plowing the land, planting trees, etc.) renders the contract defective, since such tasks are not part of *musāqāh*.
7. Specification of a contract period that is customarily too short for fruits to grow harms the worker, and voids the intent of the contract which is partnership in the fruits, thus rendering the contract defective. Conversely, the contract would be deemed defective if ripe fruits were already in existence, since the worker is only entitled to a share by virtue of his work, and the work of *musāqāh* is non-existent once the fruits are ripe and reach full size.
8. If an orchard is jointly owned by two parties, and they engage in a *musāqāh* contract between them, the contract is defective. This follows from the fact that the essence of *musāqāh* is a hiring contract, and it is not possible for one person to be simultaneously a partner and an employee of his partner. The basis of this ruling is that an employee must work exclusively in the property of the one who hires him, and thus may not work in a property of which he is a co-owner.

In this case, if the partner/worker does perform the tasks of *musāqāh*, he is not entitled to any wages, and his work is considered to be for his own benefit. The Ḥanbalīs accepted the Ḥanafī ruling of defectiveness of this contract of *musāqāh* with a partner, not because of the above mentioned Ḥanafī reasons, and the fact that the worker would not receive any compensation for his work.

In contrast, the Shāfi'īs deemed this contract permissible if the worker is given a larger share than what he would be entitled to under the partnership. Thus, if the worker is given a larger share as compensation for his work, the Shāfi'īs and the Ḥanbalīs would deem the contract permissible.<sup>6</sup>

<sup>6</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.327), *Al-Muḥallā 'alā Al-Minhāj* (vol.3, p.63), 'Ibn Qudāmāh (, vol.5, p.580), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.533).



For instance, if each partner has a half-ownership of the trees, then one of them may be a worker under *musāqāh*, thus earning two-thirds of the output with the one-sixth increment being the compensation for his work. However, the language of the *musāqāh* must specify that it pertains only to the portion of the trees not owned by the worker (or not specify the trees at all). Thus, if one partner tells the other that he is engaging him in a *musāqāh* for all the trees, the contract would not be valid.

The Ḥanafī legal status rulings for defective *musāqāh* are as follows:<sup>7</sup>

1. The worker may not be forced to perform the work under the contract. This ruling follows from the fact that his obligation to perform derives from the contract, and the latter is not valid.
2. All of the output would belong to the tree-owner, since it is a growth in his property. In contrast, the worker's entitlement derives from the contract, which is not valid.
3. In this case, the worker is entitled to his market wage, in analogy to the ruling in defective *'ijārah*.
4. 'Abū Yūsuf ruled that the worker's compensation should be the smaller of the market wage for his work and the value of his share as named in the contract. In contrast, Muḥammad ruled that the worker is entitled in a defective *musāqāh* to his full market wage, regardless of how large it may be.

### 112.2.2 Mālikī rulings

The Mālikīs ruled<sup>8</sup> that if a *musāqāh* is found to be defective prior to the commencement of work, it is automatically voided. If defectiveness is discovered after the commencement of work, then it is voided at that time, and the worker is entitled to his market wage, to ensure that he is not harmed by the voiding. The latter ruling follows from the view that the *musāqāh* thus becomes a defective *'ijārah* or defective sale.

If the contract promised an additional compensation to the worker, the contract becomes a defective *'ijārah*, whereby the landlord would have hired the worker to work in exchange for a portion of the fruits together with the additional compensation. Thus, the *'ijārah* is defective, and the worker should be paid the market wage less the additional promised compensation, and he would not be entitled to any portion of the fruits, even if defectiveness is discovered after the work was done.

On the other hand, if the worker promised the landlord an additional compensation, the contract becomes a defective sale of fruits prior to their ripening. Thus, the ruling renders the worker a buyer of the named portion of the fruit

<sup>7</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.188).

<sup>8</sup> Ibn Juzayy ((Mālikī), p.280), Al-Dardīr ((Mālikī)A, vol.3, p.722), 'Ibn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, p.248).



in exchange for the additional compensation and the market value of his work. Thus, the worker should be given back whatever he paid, as well as his market wage, and he would thus have no right to the fruits.

Finally, the defectiveness of the *musāqāh* need not turn it into another contract. For instance the defectiveness may arise from a harmful situation, non-compliance with one of the validity conditions, or significant uncertainty (e.g. in *musāqāh* over multiple orchards). In such cases, the *musāqāh* would continue, with conditions being determined by conventionally similar *musāqāh*. For instance, if a *musāqāh* over ripened and un-ripened fruits, the contract would implicitly contain the sale of an unknown (the worker's portion of the fruits) for an unknown (the amount of work). Similarly, the defective *musāqāh* may arise due to conditions that the landlord participate in the work or provide tools of production in a small orchard (to the exclusion of providing animals for work in a large orchard, which may be required of the landlord). Thus, 'Ibn Al-Qāsim ruled in all such cases that the *musāqāh* would be replaced with an equivalent *musāqāh*. In contrast, 'Ibn Al-Mājahūn ruled that all defective *musāqāh* automatically become equivalent *'ijārah* contracts.

### 112.2.3 Shāfi'ī and Ḥanbalī rulings

The Shāfi'īs and Ḥanbalīs ruled<sup>9</sup> that if the work of *musāqāh* is done, and the fruits ripened, the true owner of the trees is found to be a party different from the landlord in the *musāqāh*, the latter must pay the worker his market wage. This ruling follows from the fact that the landlord must thus compensate the worker for his work, since the promised compensation with fruits became defective.

They ruled thus for all defective *musāqāh*, that all fruits belong to the rightful owner of the trees, since they are a growth in his property, and the worker is entitled to his market wage. In this regard, they listed many conditions under which the *musāqāh* would be deemed defective, including: (i) ignorance of the contracting parties' shares, (ii) stipulating an unknown share to one party or a known financial compensation or amount of fruit, (iii) stipulating a condition that the landlord must share in the work, (iv) or the worker's tending to tasks other than watering and tending to the trees made subject to the *musāqāh* contract.

In summary, all jurists agree that a *musāqāh* that is found to be defective prior to commencement of work must be voided. The non-Mālikī jurists further ruled that if defectiveness is discovered after the commencement of work, then the worker is entitled to his market wage. In contrast, the Mālikīs only ruled in the latter case that the worker would be entitled to his market wages if the *musāqāh* contract became a different type of contract by virtue of the defectiveness. However, the Mālikīs ruled that if the contract does not change to a different type, then the *musāqāh* continues through an equivalent *musāqāh*.

<sup>9</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.326-7,331), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.393), 'Ibn Qudāmah (, vol.5, pp.381,392), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.532,502).



## 112.3 Contract termination

### 112.3.1 Ḥanafī rulings

The Ḥanafīs ruled in analogy to *muzāraʿa* that *musāqāh* may be terminated in one of three ways: (i) if its specified period expired, (ii) if one of the contracting party died, or (iii) if the contract is voided in a manner similar to *ʿijārah* through an explicit revocation or a valid excuse.<sup>10</sup>

Among the valid excuses recognized by the Ḥanafīs as legitimate bases for terminating a *musāqāh* are the following:

- The worker may be found out to be a known thief who is thus feared to steal the fruit or branches of the tree prior to distributing the fruits. Thus, the landlord should not be bound to this potentially harmful contract, and he is allowed to void the contract to avoid such harm.
- The worker may fall sufficiently sick that he cannot perform the work himself, and it may be financially harmful to hire others to do his work (whether or not this obligation to hire others is stipulated in the contract). Thus, his sickness becomes a valid excuse for terminating the contract to avoid causing him harm for which he had not contracted.
- The Ḥanafīs had two opposing opinions with regards to the worker's travel as an excuse for terminating *musāqāh*. The majority opinion is to reach a compromise between the two opinions by making the worker's travel a valid excuse for termination if he is required to do the work himself, but not a valid excuse if he is allowed under the contract to hire others to do the work.

If the worker dies, his heirs are permitted to perform his tasks and see the fruits to ripening, even if the landlord does not wish them to do so, in order to protect everyone's best interest. Similarly, if the landlord dies, the worker should continue his work, even if the landlord's heirs do not wish him to do so. If both parties were to die, the worker's heirs have the option to continue the work. Then, if the worker's heirs decide not to continue working, the landlords are given the option [to void the contract, or finish the work at their own expense].

The ruling based on juristic approbation is that the *musāqāh* would continue if its period expired before the fruits ripened. In this case, the worker is given the option to continue working without paying a rent, or leave. This is in contrast to the case of *muzāraʿa*, where the farmer would have to pay the landlord a rent for his portion of production. The difference in rulings follows from the fact that trees may not be leased, while land may be. Another difference between the two contracts is that the worker would be responsible for all work after expiration in *musāqāh*, but the two parties would share in this responsibility in *muzāraʿa* after the establishment of the worker's responsibility to pay rent.

<sup>10</sup> Al-Kāsānī ((Ḥanafī), vol.6, p.188), 'Ibn Al-Humām ((Ḥanafī), vol.8,p.48), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.268), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.204), ʿAbd Al-Ghānī Al-Maydānī ((Ḥanafī), vol., p.234).



In other words, the worker is either responsible for the work or the rent, but cannot be held responsible for both at the same time.

If the worker decides not to work in this case, then the landlord or his heirs can choose one of three options: (i) share fruits according to the conditions of the contract, (ii) give the worker the value of his share of fruits, or (ii) bear the expenses of the remaining work until the fruits are ripe. In the final case, the landlord or his heirs may demand compensation from the worker in proportion to his share of the fruits. This latter ruling follows since the worker is not permitted to cause harm to others.

Al-Zayla<sup>cī</sup> took issue with the last ruling to seek compensation from the worker only in proportion to his share of the fruits. Indeed, he reasoned, the landlord or his heirs should be entitled to full compensation of the cost of all the work, since the worker earned his share in the fruits as compensation for performing all of the work. Thus, the above ruling of seeking compensation from the worker only in proportion to his share of the fruits would be tantamount to giving the worker compensation for part of the period during which he did not work.

### 112.3.2 Mālikī rulings

The Mālikīs ruled<sup>11</sup> that the *musāqāh* contract is inherited. In this regard, if the heirs of a worker in *musāqāh* are deemed untrustworthy, they may provide trustworthy workers to take their place and retain the contract. Conversely, if the landlord does not wish to allow the worker's heirs to work or hire others out of his estate, then the landlord is responsible for the work himself.

They further ruled that a *musāqāh* is not voided if the worker is a thief or transgressor, or if he is incapable of working. In such cases, the worker should hire an alternate worker, and pay him out of his share of the fruits if he has no other way of paying him.

Those rulings follow from the Mālikī view that *musāqāh* is a binding contract, which may only be voided if there is a valid excuse. Thus, neither party is allowed to void the contract unilaterally without the other's consent.

### 112.3.3 Shāfi'ī rulings

The Shāfi'īs ruled<sup>12</sup> that *musāqāh* may not be voided based on excuses. For instance, they ruled that if a worker was found to be untrustworthy, a monitor may be appointed to watch him until the work is done, since the work continues to be an obligation on the worker. Alternatively, the worker may be replaced by hiring another to complete the work if it is not possible to force the original worker to meet his obligation.

The Shāfi'īs further ruled that a *musāqāh* is terminated upon the expiration of its period. Thus, if the contract period was ten years, and the fruits of the

<sup>11</sup>Ibn Ruṣḥd Al-Ḥafīd ((Mālikī), vol.2, p.247), Al-Dardīr ((Mālikī)A, vol.3, p.713).

<sup>12</sup>Al-Khaṭīb Al-Shīrīnī ((Shāfi'ī), vol.2, p.331), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.391 onwards).



tenth year appeared after the contract expired, the worker would not be entitled to any share in those fruits that appear after the contract expiration.

On the other hand, if the fruits appeared prior to the contract's expiration, but only ripened after the contract expired, then the worker has a right associated with such fruits. This ruling follows from the fact of appearance of the fruit prior to contract expiration, and the worker would thus be obliged to continue working.

If the *musāqāh* named a specific worker, then it is terminated upon the death of that worker. However, a *musāqāh* is not terminated upon the death of the landlord during its period. In the latter case, the worker must continue his work and take his share of the fruits. However, if the worker happened to be the heir of the landlord, the *musāqāh* is thus voided, since the heir cannot become his own employee.

If the worker dies prior to finishing the work for which he had contracted, then his heirs may use his estate to finish the work. This follows from the fact that the obligation to complete the work is established upon the worker, and this obligation must be satisfied out of his estate, in analogy to all other debts and obligations. However, the heir is permitted to complete the work himself or use his own wealth to hire someone who does. If the heir is skilled and trustworthy, the landlord must thus allow him to finish the work. Otherwise, he may resort to the ruler to hire a skilled and trustworthy worker out of the estate of the deceased worker. Finally, if the deceased worker left no estate, it is not permissible to make his estate indebted for the cost of the remaining work, since the worker's juristic personality ceases to exist following his death.

Thus, we see that the Shāfi'is find *musāqāh* when established as a liability not to be terminated upon the death of either party. Similarly, we have seen that they do not consider the contract terminated if the worker transgresses, escapes, is incarcerated, or becomes sick before ending his work. In all such cases, a monitor is appointed or an alternate worker is hired to complete the work at the original worker's expense.

The Shāfi'is also ruled that if the landlord and the worker disputed over the shares of fruit given to each of them, each of them should take an oath that his claim is true and the other's is false. Both their claims in this case are given equal priority since each is denying the other's claim. Thus, if each of them takes an oath against the other's claim, the contract is voided. In this case, all fruits would belong to the landlord, and the worker would be entitled to the market wage for his work.

### 112.3.4 Ḥanbalī rulings

The Ḥanbalīs ruled<sup>13</sup> that *musāqāh*, like *muzāraʿa*, is a permissible but non-binding contract. Thus, either party may unilaterally void the contract. Thus, if a *musāqāh* is voided after fruits are observable, the fruits must be shared between the landlord and the worker according to the ratios specified in the

<sup>13</sup>Ibn Qudāmah (, vol.5, pp.372-7), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.528-30).



contract, since it would thus have grown in their joint property. In this case, the worker must continue to perform the work, in analogy to an entrepreneur in a defective silent partnership who is required to continue with the sale of merchandise. Thus, they agreed with the Shāfiʿī ruling in this regard.

They further ruled that *musāqāh* is not voided by the worker's death. In this case, the worker's heirs must continue the work which was established as a liability on the worker in exchange for his right to the fruits. If the heirs refuse to continue the work and take the fruits, they are not forced to do so. In the latter case, the ruler may hire a worker to complete the work and pay for it out of the worker's estate. If the worker has no estate, part of his share of fruits may be used to hire someone who would finish the work.

If the worker voided the contract, or left prior to appearance of the fruits, then the worker is not entitled to any compensation. In this case, the worker is deemed to have voluntarily dropped his right, in analogy to an entrepreneur who voids the contract prior to realization of profits, and the worker for a promise of reward who voids the contract prior to finishing his task.

If the landlord voids the contract after the worker commenced work but prior to appearance of fruits, he had to pay the worker the market wages for his work. This is in contrast to the case of silent partnership, since profits in the latter do not grow out of the property alone, but through the work of the entrepreneur, which may not have generated any profits and thus the entrepreneur would not be entitled to any compensation. However, fruits grow out of the tree, and the worker's efforts affect the chance of growth of the fruits after the contract is voided.

If the worker dies, becomes insane, or is interdicted due to mental incompetence, then the Ḥanbalīs agree with the Shāfiʿīs that the contract would be voided if the contract specified the worker by name. In contrast, the Ḥanbalīs differed from the Shāfiʿīs by ruling that the *musāqāh* is voided if the landlord dies, becomes insane, or is interdicted due to mental incompetence.

The Ḥanbalīs also considered cases where an excuse is recognized but the contract is not voided. For instance, if the worker is trustworthy but his health does not allow him to do the work, another worker may be added to assist him. This ruling, in agreement with the Shāfiʿīs, is based on the view that the worker is still liable to do the work, and there is no harm in allowing him to do part of it. However, if the worker is totally unable to do the work, then the landlord may replace him with one who can. In either case, the original worker is responsible for the wages of the second, since he is obliged to get the work done.

The Ḥanbalīs also agree with jurists of the other schools that if a period of the contract is specified, then the contract is terminated upon the expiration of that named period. However, they ruled that if the period of the contract was sufficient for fruits to grow under usual circumstance, but the trees produced no fruits that year, then the worker is not entitled to any compensation, in analogy to silent partnerships.



## Chapter 113

### *Mughārasa* or *Munāṣaba*

This chapter contains two sections: (i) definition of *mugharasa*, and (ii) its legal status.

#### 113.1 Definition

*Mugharasa* is a contract whereby a landlord gives a worker access to his land to plant trees therein.<sup>1</sup> The Shāfi'īs defined the contract as a landlord giving a man access to his land, so that the latter would provide the small trees, and the two will share ownership of the trees.<sup>2</sup>

People of the Levant called the same contract *munāṣaba* or *mushāṭara*.

#### 113.2 Legal status rulings

The non-Mālikī jurists forbade the *mugharasa* contract whereby the land and trees are shared between the original landlord and the worker, while the Mālikīs allowed the contract subject to certain conditions. On the other hand, for the *mugharasa* contract that only results in joint ownership of the trees, the Ḥanafīs and Ḥanbalīs ruled that the contract is permissible, while the Mālikīs and Shāfi'īs ruled that is impermissible. The Shāfi'īs, who disallowed the contract whether the trees alone or the land and the trees are shared, based their ruling on the view that such contracts are not needed.

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<sup>1</sup>Ibn Juzayy ((Mālikī), p.281).

<sup>2</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.324).



### 113.2.1 Ḥanafī rulings

The Ḥanafīs ruled<sup>3</sup> that it is not permissible for a landlord to give clear land (with no trees or plants therein) to another for a fixed number of years to plant trees, whereby the land and the trees will be jointly owned at the end of the contract. They argued that this contract is impermissible for three reasons:

1. The contract condition thus makes the land, which existed prior to partnership and did not need the worker's labor, jointly owned. Thus, the contract is akin to the forbidden transaction of giving a miller some wheat, with the price being paid as part of the flour he produces.<sup>4</sup> The author of *Al-Hidāyah* accepted this opinion as well, agreeing with the author of *Al-ʿināyah* that it is equivalent to hiring a person to die his cloth and take part of it as his wages. This renders the contract and the partnership defective.
2. The landlord would thus have made a part of the land compensation for all of the planted trees, and a portion of the loss a compensation to the worker's labor. In other words, the worker would have bought part of the land with an unknown amount of planted small trees, rendering the sale defective. Ibn ʿĀbidīn found this a compelling argument for the defectiveness of the contract. Indeed, he reasoned that the analogy to giving the miller part of the flour as wages is harmless, and commonly used in *muzāraʿa* and *musāqāh*. Indeed, while ʿAbū Ḥanīfa ruled thus based on analogy to the Ḥadīth, ʿAbū Yūsuf and Muḥammad abandoned this ruling based on analogy in favor of following the precedent of the Prophet's (pbuh) dealing with the people of Khaybar. Since the latter reasoning is more valid, rendering the above mentioned *mugharasa* contract defective based on the defective sale argument is more appropriate.
3. The contract is also tantamount to having the landlord hire a worker to turn his land into an orchard full of trees, using the worker's own tools, in exchange for half of the orchard that would come to existence through his work. This renders the contract a defective *ʿijārah*, since the wages are unknown, and contain *gharar*.

Regardless of the reasoning, once the *mugharasa* is deemed defective, the landlord is entitled to all fruits and trees. The worker in this case is entitled for

<sup>3</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.49), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.286), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.234), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.5, p.203 onwards).

<sup>4</sup>In fact, the contract is tantamount to hiring the worker with part of the price being a portion of the land in which he worked. This type of transaction is forbidden based on the narration of Al-Dāraqutnī on the authority of ʿAbū Saʿīd Al-Khudriy, who said that the Prophet (pbuh) forbade paying the owner of a male animal with part of the offspring, or paying the miller with part of the wheat. ʿAbū Ḥanīfa and Al-Shāfiʿī used this Ḥadīth as proof that it is not permissible to hire a worker with part of the material in which he works being considered a wage, c.f. Al-Shawkānī (, vol.5, p.292 onwards).



a compensation equal to the value of what he planted on the way he planted it, plus the market wages for his labor.

The Ḥanafīs developed a juristic trick (*ḥīlah*) to legitimize *mugharasa* as follows: the landlord may sell part of the land for part of the trees. Then, he may hire the worker to work for a number of years with a minimal wage, so that the worker may work in both his own land and the landowner's.

The Ḥanafīs also allowed *mugharasa* if the worker is rewarded with partnership in trees and fruits only, to the exclusion of the land, as reported in *Al-Fatāwā Al-Khāniyyah*.

### 113.2.2 Shāfiʿī rulings

The Shāfiʿīs ruled<sup>5</sup> that *mugharasa* is not permissible, since it is not allowed for a worker to labor in a land in exchange for part of its output. Moreover, they reasoned that planting trees is not part of the labor of *musāqāh*, and thus would trying to legitimize the contract thus would render it defective. Finally, they said that there is no need for such contracts, since hiring the worker or leasing the land (*ʿijārah* contracts) can produce the same warranted result.

In contrast, they argued that trees cannot be leased, and thus *musāqāh* was legitimized to meet the need that would not be fulfilled using the *ʿijārah* contract.

Thus, they ruled that if *mugharasa* did in fact take place, then the worker is entitled to all trees. The worker would thus be required to compensate the landlord with the market rent for equivalent pieces of land. This ruling is made in analogy to the ruling in *muzāraʿa* in exchange for part of the produce that the worker would be responsible to pay rent for any part of the land that he did not cultivate.

### 113.2.3 Ḥanbalī rulings

The Ḥanbalīs ruled<sup>6</sup> that the contract where a worker plants trees in a landlord's land, on condition that they would thus jointly own the trees and the land, is defective. They ruled thus based on the condition that the two parties would become partners in the original property (the land and the trees), which is defective in analogy to the contract where a landlord gives the worker access to his trees on condition that both the trees and the fruits would be jointly owned, or gave him access to his land on condition that both the land and the crop become jointly owned. Thus, the contract is deemed defective, and the worker is entitled to the market wages for his labor.

On the other hand, they ruled that a *musāqāh* contract, wherein the worker would plant the trees and tend to them and then have a defined percentage of the fruits, is valid. In this case, they ruled that there is no defectiveness in

<sup>5</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.324), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.167).

<sup>6</sup> Ibn Qudāmah (, vol.5, p.380 onwards).



the contract, merely the worker's labor is increased, and his compensation is reduced.

Thus, we have reviewed the opinions of the three schools that forbade *mugharasa* based on protecting the rights of contracting party and avoidance of uncertainty associated with the growth of trees. Moreover, those jurists objected to partnership in the original property, which is tantamount to making the entrepreneur a partner in the capital of a silent partnership. Moreover, they reasoned that planting trees is not a conventional part of the work of *musāqāh* which was legalized in the Prophet's traditions, and *musāqāh* is not valid for small trees for a period that is insufficient for the production of fruits.

#### 113.2.4 Mālikī rulings

The Mālikīs ruled<sup>7</sup> that work to grow trees may be accomplished through one of three contracts: (i) an *'ijārah* contract, whereby the worker is paid a known wage, (ii) a *ju'ālāh*, whereby the worker would be given a share of the growth, or (iii) a *mugharasa*.

A *mugharasa*, whereby the worker would be entitled to a share of the trees, the fruits, and the land, would be valid in the Mālikī school if it satisfies the following five conditions:

1. The worker must be planting trees that stay in the land, to the exclusion of crops, beans, etc.
2. The trees must be similar in the period required to bear fruit, otherwise the contract would not be permitted.
3. The term of *mugharasa* should not be a large number of years. Thus, if the term of the contract exceeds the time it takes for fruits to grow, the contract would not be permitted. The contract is permissible if its duration is just long enough for fruits to grow, and there are two opposing views for the case where its period is shorter.
4. The worker must be given a share both in the land and the trees. However, the contract is not permitted if the worker is only given a share in one or the other. An exception is allowed whereby the worker would be given ownership of the land occupied by his trees, and no other land.
5. *Mugharasa* is not allowed in lands established as mortmains, since the contract is similar to sales.

The Mālikīs forbid two types of conditions in *mugharasa*, *musāqāh*, and *muzāra'a*:

1. If one party to the contract stipulates a condition that gives him a substantial exclusive benefit (but minor such exclusive benefits are tolerated).

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<sup>7</sup>Ibn Juzayy ((Mālikī), p.281).



2. Stipulating a *salam* contract as a condition of the contract, or ordering the worker to uproot the planted trees.

In summary, the Ḥanbalīs consider *mugharasa* valid if the worker is only given a share of the fruits, in analogy to *musāqāh*. The Ḥanafīs consider it valid if the worker shares the trees and fruits with the owner, and allowed sharing in the land as well by a trick using a sale contract and an *'ijārah* contract. The Mālikīs allowed *mugharasa* for a share of the land and trees subject to some conditions. Finally, the Shāfi'īs ruled that *mugharasa* is not needed, and hence deemed it invalid regardless of the conditions.



Part XX

Division Agreements  
(*Al-Qisma*)



## Chapter 114

# Division of Physical Properties

The topics concerned with the division of non-fungible ( *'a<sup>c</sup>yān* or *riqāb*) will be covered in six sections:

1. Definition, legality, cornerstones and characteristics.
2. Types of division agreements.
3. Contract conditions.
4. Means of division.
5. The implementer of division.
6. Legal status.

### 114.1 Definition, legality, and cornerstones

#### 114.1.1 Definition

Dividing a property refers to distributing it among the various entitled parties. Jurists of the different schools gave it similar definitions. Thus, the Ḥanafīs defined it as receiving one's common share in a specific non-fungible property.<sup>1</sup> The *Majallah* (item #1114) defined it thus: “*qisma* refers to specifying portions of a jointly owned property for ownership by each of the partners, i.e. separating the shares through measurement by size, weight, or volume”. In other words, division of a jointly owned property exchanges each partner's ownership

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<sup>1</sup>Al-Zayla<sup>c</sup>ī ((Ḥanafī Jurisprudence), vol.5, p.264), 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, p.178), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.2), <sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.91).



in the remaining property for the others' ownership in the share given to him exclusively.<sup>2</sup>

This notion of exchange is clear in mutually consensual division of properties. Moreover, obligatory division that is implemented by a judge upon the partners' request implies their mutual consent to exchange of ownership. Thus, a division includes an element of exchange of one's ownership for another's, as well as an element of sorting and separation of the property's components. The sorting aspect is clearer in the cases of homogeneous properties measured by weight or volume, while the exchange aspect is clearer in the case of non-fungibles. We have also seen that obligatory division is permissible, for instance in the case of selling a debtor's property to repay his debts.

The Mālikī definition is very similar to the Ḥanafī counterpart. Thus, they defined division as specifying each partner's previously unspecified share in a jointly owned property (be it real estate or otherwise). In this regard, it is possible to division the usufruct rights of a property, while maintaining joint ownership of the property itself. The Mālikīs further distinguish between three types of division: (i) accommodation division, (ii) mutual consent division, and (iii) random division.<sup>3</sup>

The Shāfi'ī and Ḥanbalī definition are the clearest:<sup>4</sup> "division is separation of entitlements to various parts of the property, and sorting them away with demarcations, by dividing the entitlements through measurement by volume or otherwise".

### 114.1.2 Legality

Jurists are in consensus that division is permissible, based on the Qur'ān and Sunnah:

- Proof in the Qur'ān is provided by the verse: "And tell them that water is to be divided between them; each one's right to drink being brought forward by suitable turns" [54:28], which establishes the legality of accommodation division. Further proof is provided by the verse: "But if at the time of division, other relatives or orphans or poor are present, feed them out of the property" [4:8], referring to the division of an inheritance. Finally, the division of spoils of war is specified in the Qur'ān as follows: "And know that out of the booty that you may acquire in war, a fifth share is assigned to Allāh and his Messenger" [8:41], which separation of a fifth from the other four-fifths requires a division.
- Proofs from the Sunnah include the Prophet's (pbuh) division of the spoils of war from Ḳhaybar and Ḥunayn between the fighters, and he (pbuh) also divided inheritance between heirs, illustrating the legality of division.<sup>5</sup>

<sup>2</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.17).

<sup>3</sup> Al-Dardīr ((Mālikī)A, vol.3, p.359 onwards).

<sup>4</sup> *Ḥāshiyat Al-Bājūrī 'alā 'ibn Qāsim* (vol.2, p.351), 'Ibn Qudāmah (, vol.9, p.114), *Al-Buhūtī* (3rd printing (Ḥanbalī), vol.6, p.364).

<sup>5</sup> Review the relevant Ḥadīths in Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.178).



The contract is also needed to meet the needs of people, thus allowing each partner to deal in his independent share of the property. Thus, division allows the partners to avoid the disadvantages of joint ownership such as distributed control among a multiplicity of partners.<sup>6</sup>

### 114.1.3 Cornerstone and reason

The cornerstone of division is the act by means of which the separate entitlements are demarcated through measurement by size or volume. The reason for dividing a joint property is the request by some or all of them to be given access to their exclusive share of the property to allow him to benefit or deal in it accordingly. Thus, division is invalid unless the joint partners, or some of them, request it. Once one or more of the partners ask for dividing a property, the division only becomes binding if the division does not reduce the property's conventional usufruct. For instance, a wall, bathroom, or a small house may not be divided according to this condition.<sup>7</sup>

### 114.1.4 Characteristics

We have seen that jurists at times recognize dividing a property as an act of sorting and separation, and at other times recognized as an exchange akin to sales. In what follows, we shall list the views in each school.

#### Ḥanafī views

The Ḥanafīs stated<sup>8</sup> that the division procedure, when discussed generally both for fungibles and non-fungibles, involves a sorting aspect (by giving each partner full control of his property), and an exchange aspect (by compensating each for the ownership he forfeits in other partners' properties).

They further said that the sorting aspect is more manifest in dividing fungible properties measured by weight, volume, size, or count. In such cases, one partner may take his share in the absence of his partners. In contrast, they said that the exchange aspect is more dominant in non-fungibles (e.g. animals, real estate, etc.) with non-homogeneous components. In the latter cases, no partner is allowed to take his share in the absence of his partners.<sup>9</sup>

On the other hand, the Ḥanafīs ruled that if jointly owned property had a single genus, then obligatory division is permissible, and a judge has to division such properties upon the request of any single partner. This ruling follows from the dominance of the sorting aspect of this division. Moreover, forced exchange can be valid under certain circumstances, e.g. in the case of selling a debtor's property to repay his debts.

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<sup>6</sup>Ibn Qudāmah (, vol.9, p.112).

<sup>7</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.178).

<sup>8</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.178), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.4, p.91),

Ibn Al-Humām ((Ḥanafī), vol.8, p.2), Al-Kāsānī ((Ḥanafī), vol.7, p.26).

<sup>9</sup>This distinction between the two aspects was central to items #1116, 1117, 1118, 1119 of *Al-Majallah*.



**Mālikī views**

The Mālikīs ruled<sup>10</sup> as follows for the three types of division that they recognized:

1. Division by mutual consent is concluded without randomization, and it is analogous to sales.
2. Division by lottery identifies separate rights to the partners in their properties, and it is not akin to sales.
3. Division for accommodation applies to the division of rights to the usufruct of various parts of a property, and it is thus akin to leasing.

**Shāfiʿī views**

The Shāfiʿīs stated<sup>11</sup> that division sorts shares in property, and separates rights thereof, unless it involves a side-compensation with property other than the one divided. In the latter case, they deemed the contract a sale. For instance, if the joint property was a water-well, which cannot be divided, then one of the partners may take it by lottery, and the other partners may be paid the value of their shares monetarily.

Similarly, they ruled that division is tantamount to sale if the distributed portions are assessed by market value (rather than size). For instance, if part of the land is twice as valuable as another, one partner may be given one third (the more valuable part per acre) and the other two thirds (the less valuable part per acre), and they would thus have received an equal part in value each. This seems to be the most accurate opinion among the various juristic schools.

**Ḥanbalī views**

The Ḥanbalīs stated<sup>12</sup> that division is a sorting of rights and demarcation of one partner's entitlement from that of another. However, they reasoned, it cannot be seen as a sale, since it does not use the language of transfer of ownership, it does not allow for preemption rights, it can be enforced without some parties' consent, it can be determined by lottery, and one partner's entitlement is affected by that of another. All such aspects are alien to sales contract, wherein they would be impermissible. Moreover, the Ḥanbalīs reasoned that division is contrasted from sales by giving it its own name and legal status rulings, and thus is a distinct contract of its own right.

This distinction between sales and divisions is juristically significant. For instance, by distinguishing the contract from sales, it is possible to division ownership of fruits that are measured by volume in sales based on weight in division, and vice versa. Moreover, since the contract is not a sale, parting prior to receipt is permissible even for properties in which a sale would be voided

<sup>10</sup> Al-Dardīr ((Mālikī)A, vol.3, pp.660-664).

<sup>11</sup> *Ḥāshiyat Al-Bājūrī* (vol.2, pp.352-4), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.2, p.306).

<sup>12</sup> Ibn Qudāmah (, vol.5, pp.114,129), Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.365).



by such parting. However, if the contract is deemed to be a sale, those rulings would have to be reversed.

Moreover, if division is viewed as an exchange, wherein each partner compensates the other for part of his ownership, it would indeed be viewed as a sale for the compensated part, and a sorting of the remainder. Thus, the Ḥanbalīs recognized division in general to be simply a sorting of property rights, unless there is implicit compensation, in which case the compensated part is deemed to be part of a sale.

## 114.2 Types of division

### 114.2.1 Ḥanafī classification

The Ḥanafīs classified divisions into two main types:<sup>13</sup>

1. Obligatory division, which is implemented by a judge based on the request of one or more of the partners. In this case, if the judge or his deputy division the property by lottery, no partner has the right to object to the outcome.<sup>14</sup>
2. Voluntary division, which is implemented by mutual consent. This type of division is considered a contract, which requires the standard contract cornerstones of offer and acceptance. The object of the contract in this case is the jointly owned property that is eligible for division.<sup>15</sup>

Each of the two Ḥanafī categories of division is further divided into two types:

1. Division by division, in which specific portions of a jointly owned property is designated for each partner. Such divisions are allowed for properties that can be divided without harm, such as homogeneous properties measured by weight, volume, or count, or non-fungible but divisible such as large houses. Division by division can be either voluntary or obligatory.
2. Division by consolidation, in which each partner's entitlements are collected together and associated with a single non-fungible property.<sup>16</sup> For instance, if two partners shared ownership of a heap of cotton, the cotton may be divided physically into part that belongs to one and part that belongs to the other. Such division is only allowed for properties of a uniform genus. Thus, it applies to homogeneous goods measured by weight, volume, or count. It can also be applied to individual camels, cows, or sheep, within one genus. However, it does not apply to mixtures of two

<sup>13</sup>Al-Kāsānī ((Ḥanafī), vol.7, pp.19-22).

<sup>14</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.184).

<sup>15</sup>*Al-Majalla* item #1121 refers to voluntary division, and #1122 refers to obligatory or legal division.

<sup>16</sup>This distinction between division by division and division by consolidation is discussed in *Al-Majallah* (item #1115).



or more genera, since differences in genera may make the division unequal and thus harm one of the partners.

'Abū Ḥanīfa ruled that real estate and land cannot be divided by consolidation to avoid potential harm, since real estate and land can vary significantly in value. Thus, he reasoned by analogy to the case of properties of different genera.

In contrast, 'Abū Yūsuf and Muḥammad allowed real estate and land to be divided by consolidation, allowing for side-compensations for differences in value. On the other hand, all Ḥanafīs agreed that if the joint property included both a piece of land and a house, then there is clear difference in genus, and each should be divided separately.

### 114.2.2 Mālikī classification

The Mālikīs recognized two main types of division for physical properties:<sup>17</sup>

1. Division by mutual consent, which they deem to be akin to sales. Thus, whoever takes property as part of such division owns it thus, and may only return it based on mutual consent, in analogy to revocation of sale. Moreover, properties taken in such division may not be returned based on claims of injustice, unless an assessor is brought to verify the claims. This type of division applies to properties of a single genus (e.g. clothes), or of different genera (e.g. clothes and an animal).
2. Division by lottery sorts the joint ownership of a property, and it is not akin to a sale. Thus, one partner may return what he was given based on a claim of injustice, without need for a professional assessor. Otherwise, such division is binding on all parties. It applies only in cases of joint property of a single genus, and it cannot be implemented so that the rights of two of the partners remain joint.

### 114.2.3 Shāfi'ī classification

The Shāfi'īs recognized three types of division,<sup>18</sup> depending on equality in shape or value, and whether or not a side-payment is necessary:

1. Sorting divisions are merely the demarcation and distribution of each partner's right, thus it does not contain any element of sale. This type of division is possible as long as the sorting causes no harm, e.g. in distributing grains, fat, similar buildings, or uniform land. Such divisions may be obligatory, in which case each partner is bound by the division if another partner requests it. The property in this case would be divided by using the appropriate measure for its genus: volume, weight, size, or count. If the shares are equal, the property would first be divided into

<sup>17</sup> Al-Dardīr ((Mālikī)A, vol.3, pp.662-4), 'Ibn Juzayy ((Mālikī), p.284 onwards).

<sup>18</sup> Ḥāshiyat Al-Bājūrī (vol.2, pp.352-4), cite[vol.4, pp.341-4]R32.



equal parts based on the appropriate measure, and then a lottery would determine each partner's allocated share.

2. Division by value would take place if the parts of a divided property are unequal in value, and different size shares must be given to equate the value of their distributed shares. The above referenced example of giving one partner the fertile one-third of the land and the other the infertile two-thirds, where the two parts are thus equal in value, would be an instance of this type of division. In this case, the land would first be divided into the one-third and two-thirds portions, and then a lottery would determine which partner gets which piece of land.

This type of division is also eligible for obligatory division, whereby each partner is bound by the division if his partner requests it. On the other hand, if it were possible to perform the division by dividing the good property alone and the bad property alone, the partner cannot be forced to accept this unequal division by value. However, if the property consists of multiple movable objects of equal value (e.g. clothes of the same type but of different characteristics, or small similar adjacent shops), then both partners must accept the division by value.

3. Division with compensation may be required, whereby one of the partners may have to compensate another financially for part of the value, if the above two types of division are impossible. For instance, if the joint property is an indivisible well, then one party would take the well, and compensate the other for half its value. This type of division cannot be used without the partners' mutual consent.

The first type of division mentioned above is a pure sorting of rights, and contains no element of exchange or sale. In contrast, the latter two types do qualify as forms of sale.

We note that the Shāfi'is have thus recognized, along with the other schools, two major categories of divisions: obligatory and voluntary.

#### 114.2.4 Ḥanbalī classification

The Ḥanbalīs agreed with the Ḥanafīs in their twofold classification of divisions into:<sup>19</sup>

1. Voluntary division, which requires the mutual consent of all partners. Such divisions are used in all cases where harm may be done to one or more of the partners, or where one partner needs to compensate another. It applies to the division of small homes, mills, baths, and stores. Thus, no obligatory division can be allowed for such unique properties, and one partner's request is not sufficient to force the others to accept division.

<sup>19</sup> Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, pp.364-9).



This type of division is very similar to the Shāfiʿī notion of division with compensation. Proof for this assertion is provided by the Ḥanbalī statement that whatever cannot be divided into parts of equal value and size, or parts of equal value and unequal size, may only be divided with the mutual consent of all partners.

The Ḥanbalīs also agreed with the Shāfiʿī view that this type of division is similar to sales, and inherits the legal status of sales. This ruling follows from the fact that each partner receives his property and pays the other a compensation out of his own property, which is the essence of sales. In this regard, part of the division is a mere sorting of rights, and the compensated part is viewed as a sale. For the portion that is classified as a sale, all the prohibitions that apply to sales must therefore apply. Moreover, if a partner refuses to engage in such a division, he may not be forced to do so, based on the *Ḥadīth* narrated on the authority of 'Ibn ʿAbbās: “No harm is allowed”.<sup>20</sup>

2. Obligatory division may be applied to cases where no partner is harmed by the division, and no compensation is required. Thus, it applies to large lots of land, large orchards, large homes, large stores, etc., whether or not it has equal parts. It also applies to fungibles of a single genus that are measured by weight, volume, etc.

Obligatory division is also possible if the sizes of the portions given to each partner can be altered to make them of equal value. Otherwise, if the essence of exchange is required, then obligatory division is not allowed.

In cases where obligatory division is allowed, if one partner requests the division, the other partners or their guardians may be forced to accept it. This ruling follows since the division removes disadvantages associated with joint ownership, thus benefiting all partners by giving them more discretion in using or dealing in their respective properties.

### 114.3 Contract conditions

In what follows, we shall discuss the conditions of voluntary division and obligatory division separately in two subsections.

#### 114.3.1 Voluntary division conditions

The Ḥanafīs stipulated the following conditions for voluntary division:<sup>21</sup>

1. The contracting party must be eligible, i.e. they must be sane and discerning. This ruling follows from the fact that division may result in a

<sup>20</sup> Narrated by 'Aḥmad, 'Ibn Mājah, and Al-Dāraquṭnī, deemed *Ḥadīth ḥasan* by Al-Nawawī. It has a number of chains of narration that support one another.

<sup>21</sup> Al-Kāsānī ((Ḥanafī), vol.7, pp.18-22).



benefit or a loss, and thus the condition of sanity and discernment is imposed in analogy to the eligibility condition for sales. In this regard, the Ḥanafīs did not require the contracting parties to be of legal age, thus allowing a discerning child to engage in division with his guardian's permission. Moreover, being a Muslim, male, or free are not requirements for this contract, also in analogy to sales.

2. Ownership or guardianship of part of the property is required to be part of a division.

If the ownership condition is invoked, each party to the division must be co-owner of the divided property. This follows since division is a sorting of rights and exchange of rights, all of which apply only to owned properties.<sup>22</sup> Thus, the Ḥanafīs deem division of debts to joint creditors prior to receipt to be invalid. This ruling follows from the fact that such debts only become owned upon receipt. Moreover, debts are only legal entities, and division applies to physical properties. The Ḥanafīs also reasoned from this condition that division by an un-commissioned agent is suspended upon approval of the owner.

If the guardianship condition is invoked, then the party to a division contract must be a guardian allowed to deal in property, e.g. by being the father or his plenipotentiary, or grandfather or his plenipotentiary, of a child, an insane person, or a mentally incompetent individual. The demarcation in this case is as follows: guardians allowed to engage in sales is allowed to engage in division, and others are not.

In this regard, the plenipotentiary of a mother, brother, or uncle, may only division movable objects to the exclusion of immovable ones, since such plenipotentiaries are allowed to sell movables only.

On the other hand, the plenipotentiary of a deceased person has no guardianship rights over someone named in the will, and thus may not division his property. Similarly, the heirs of a deceased do not have guardianship over such a named person, and thus may not division his property (indeed his status is equivalent to that of the heirs). Finally, no heir may division the property of another heir, since none of them is a guardian over the others.

3. The partners or their representatives must be present at the time of division. If some of the partners division the property while others are absent, the division is voided. This follows in division by mutual consent, and must be contrasted with the case of division by a judge, which is not voided if some of the partners are absent.
4. The partners or their representatives must consent to the division. Thus, if one of the partners was a child with no guardian, the division would be invalid. This follows from the Ḥanafī view of voluntary division as akin to sales, and thus it requires mutual consent in analogy to sales.

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<sup>22</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.24), *Al-Majallah* (items #1123,1125,1126).



If one of the partners is incapable of expressing his legal consent, e.g. a child or an insane person, his guardian or plenipotentiary may take his place in expressing consent. If the child or insane person has no guardian, then the division would be suspended pending approval of the ruler, who may appoint a plenipotentiary to witness the division.<sup>23</sup>

The Shāfi'īs mostly agreed with the Ḥanafī conditions.<sup>24</sup> Thus, they ruled that the partners' consent in voluntary division is necessary even after the lottery determines the shares each will be given. They also ruled that if proof of an intentional or unintentional injustice is provided after a voluntary or obligatory sorting division, the division would thus be voided. On the other hand, they ruled that if the division involved adjustment for value or compensation, it would not be voided thus, in analogy to the rulings for sales.

### 114.3.2 Obligatory division conditions

#### Ḥanafī conditions

The Ḥanafīs stipulated four main conditions for obligatory division:

1. One or more of the partners must request division from the judge. In this regard, division cannot take place without a request of some partner, since it would otherwise constitute a forbidden dealing in the property of another without their consent.<sup>25</sup> In this regard, if one partner requests a division and others refuse, then if the property is divisible,<sup>26</sup> it would thus be made subject to an obligatory division to remove the harm caused by joint ownership. This ruling is made in analogy to the preemption rules that are instituted to prevent harm to the entitled preemptor of a sale. If the property is indivisible, then its usufruct is divided temporally, by making the partners take turns in extracting its usufruct.

In summary, division is automatically granted upon request, unless the petitioner's intent is to harm his partners. In the latter case, division is not mandated, as we shall see in the second condition.

2. There must be no harm caused by division, otherwise the essence of property being beneficial would not be realized. This condition becomes clearer when we distinguish between two types of properties:<sup>27</sup>

- (a) Fungible properties measured by volume, weight or count can be divided without causing any harm. Thus, such properties can be

<sup>23</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.180), *Al-Majallah* (item #1128).

<sup>24</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.344).

<sup>25</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.179), Al-Kāsānī ((Ḥanafī), vol.7, pp.18,22,28), *Al-Majallah* (items #1129,1130).

<sup>26</sup>Divisible properties are those the common usage of which is not affected by division, c.f. *Al-Majallah* (item #1131).

<sup>27</sup>Al-Kāsānī ((Ḥanafī), vol.7, pp.19-21), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.268 onwards).



made subject to obligatory division, and the judge may force objecting partners to accept such division to guarantee the benefits of all concerned.

- (b) Some indivisible properties, such as books, jewels, small buildings, animals, etc. cannot be divided without causing harm to all partners. Obligatory division is not permitted for such properties, since the judge is not allowed to cause harm to them.

In some cases, division may harm one partner but not the other, e.g. if a land is jointly owned and one partner's share is small. In such cases, the division may be mandated if petitioned by the majority owner, to remove the harm of joint ownership and allow the majority owner to benefit thus. In this regard, the right of the majority owner cannot be voided based on the fact that exercising that right may harm another (the minority owner).

The Ḥanafīs had two opinions regarding the previous case if the minority owner petitioned the division:

- Al-Ḥākim Al-Shahīd in his *Al-Mukhtaṣar Al-Kāfī* ruled that the property would be divided in this case, since the minority owner would have indicated his consent to his loss, while the other partner only benefits from the division. Thus, the latter may be forced to accept it.
- In contrast, Al-Qaddūrī ruled in *Al-Kitāb* that the property should not be divided in this case, since the minority owner would seem to be stubbornly transgressing by insisting on a division that harms his own interests. Thus, his request to division is ignored, and without that request no obligatory division would be possible. This is the better of the two opinions.

In this regard, if both partners had a small share of the property, the judge may only division their joint ownership by their mutual consent. This ruling follows from the view that mandating a division may only be legitimized based on maximizing benefits, while the division considered here reduces benefits. On the other hand, if they mutually agree to the division, then they have a right to do whatever they jointly agree to.<sup>28</sup>

3. The division must be fair. This follows from the sorting and exchange aspects of division, both of which require fairness and consent. Moreover, if the sorting is not fair, that implies that some portion of the partnership remains, and thus the division must be re-done.<sup>29</sup> Thus, if it is discovered that a division included a major error or injustice, it is automatically voided.

<sup>28c</sup> Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.94 onwards), Al-Kāsānī ((Ḥanafī), vol.7, p.28).

<sup>29</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.26), *Al-Majallah* (item #1127).



4. In divisions of consolidation, the joint property must be of a single genus. Thus, if the properties included different genera, divisions of consolidation would be deemed invalid, since differences in genera would result in losses of usufruct.

Similarly, 'Abū Ḥanīfa ruled that houses, lands, and grapevines may not be divided by consolidation, based on major heterogeneity that is tantamount to differences in genus. Thus, he ruled that such properties must be divided individually.

In contrast, 'Abū Yūsuf and Muḥammad ruled that houses and such properties may be divided by consolidation, since they are of the same genus by virtue of their apparent form, even though their usufructs may differ. In this regard, heterogeneity may be corrected by adjustments for value, and the judge can determine what is most beneficial to the partners.

On the other hand, all three major scholars of the Ḥanafī school agreed that a two-room house must be divided by consolidation, whether the two rooms are adjacent or disjoint.<sup>30</sup> However, this early Ḥanafī ruling does not apply in our current times, since homes today differ substantially and thus should be divided individually rather than by consolidation.

### Shāfi'ī conditions

The Shāfi'ī conditions for obligatory division are very similar to the Ḥanafī conditions. Thus, they ruled<sup>31</sup> that the ruler may forbid partners from dividing any property if that division would cause great harm (e.g. dividing a jewel, which would ruin it). In this case, they may sequentially benefit from the property, thus sharing its usufruct.

If the property's usufruct is only partially destroyed by division (e.g. breaking a sword or splitting a small bathroom or mill) the ruler may not forbid them from dividing, but he may not accept their request either, since such division is wasteful.

Finally, they ruled that if one partner has a majority share and the other a minority share, the minority owner may be forced to division the property upon the request of the majority owner, but the latter may not be forced to accept a division upon the request of the former.

### Ḥanbalī conditions

The Ḥanbalīs also agreed to the conditions stipulated above.<sup>32</sup> Thus, they also ruled that divisions are valid only if they do not cause harm, based on the *Ḥadīth*: "No harm is allowed", and that the ruler is required to division the property if it is divisible and can be used by the partners after division. In this

<sup>30</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.21 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.270), *Al-Majallah* (items #1132-1142).

<sup>31</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.340 onwards).

<sup>32</sup> Ibn Qudāmah (, vol.5, p.115 onwards).



regard, Al-Shāfiʿī and ʿAḥmad defined the harm that prevents division as any diminution in the value of any partner's share, whether or not the partners can use the divided property.

### Mālikī conditions

The Mālikīs ruled<sup>33</sup> that if jointly owned property is divisible without causing harm (e.g. land), then some partners may be forced to accept division if others request it. On the other hand, if the joint property is not divisible, then it should be sold, and its price may be divided among the partners in proportion to their shares. In this case, dissenting partners may be forced to sell if others requested division, provided that four conditions are satisfied:

1. The partner requesting the sale must not be able to sell his share of the property separately without losing any part of its value. If the partner was able to sell his share alone and get its full value, then other partners may not be forced to sell, in order to avoid causing them harm. This ruling is in analogy to the case of fungible property, in which case the other partners may not be forced to sell their property.
2. The dissenting partner must not be willing to guarantee his partner compensation for any loss caused by selling his share separately.
3. The partner requesting the sale must not have full ownership of his share of the property. Thus, if two partners jointly own a property by virtue of inheritance or sale, and one of them wished to sell the jointly owned property, then the other may be forced to sell his portion as well. However, if one of the partners has full ownership of his share of the property, then he may not force the other to sell his separate share at the same time.
4. The joint property must not be used for leasing, and must not be purchased with the intention of trading.

## 114.4 Methods of division

The Ḥanafīs described in detail the methods and procedures of division in the manner described below.<sup>34</sup> However, those listed methods and procedures seem to be the best judgment (*ʿijtihād*) of the jurists for their times, and thus such rulings will change as times change:

1. Land must be surveyed so that charts may be given to the judge, and buildings must be assessed so that each partner can know the value of his share.

<sup>33</sup>Al-Dardīr ((Mālikī)A, vol.3, pp.678 onwards) ʿIbn Juzayy ((Mālikī), p.285).

<sup>34</sup>ʿIbn Al-Humām ((Ḥanafī), vol.8, p.14 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.270), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.100 onwards), *Al-Majalla* (item #1151). Those procedures are also discussed by other schools of jurisprudence, c.f. ʿAbū-ʿIshāq Al-Shirāzī ((Shāfiʿī), vol.2, p.308 onwards), ʿIbn Qudāmah (, vol.9, p.123), Al-Dardīr ((Mālikī)B, vol.3, p.675 onwards).



2. The various shares should be separated and sorted together with its easement rights, etc. Thus, no partner's share should continue to have common rights with other partners.
3. The separated portions of the property should be given consecutive numbers or codes.
4. The names of the partners should be written on separate identical pieces of paper, then ruling by juristic approbation, a lottery should be administered by randomly pulling names from the urn and matching them to the numbers assigned to the ratios. For instance, if the partner whose name is drawn first is entitled to ten shares, he is given the first ten shares from the numbered list, so that his total share is contiguous, and so on.

In this regard, using a lottery is only preferred by the Ḥanafīs to ensure fairness. However, the divider may allocate the partners' shares in another manner, since his activity is akin to that of a judge, and thus each partner would be required to accept his allocated share.

5. *Al-Majallah* (item #1147) stated that the means of measuring shares in the property is determined by the genus of that property. Thus, parts may be measured by volume, weight, size, or count, depending on the measure used in sales of such properties. In this regard, item #1148 stated that lands should be measured and distributed by size, while trees and buildings on such land must be assessed by value.

### Monetary adjustment

The Mālikīs, Shāfi'īs and Ḥanbalīs allowed adjustments for inequality in division with financial side-payments, if it is not possible to make adjustment with shares in non-fungible properties. For instance, if the divided property is land with very heterogeneous parts, the partners' shares may be adjusted for value using financial side-payments.

In contrast, the Ḥanafīs did not allow the use of financial adjustments in sorting division, except by the mutual consent of all partners. They based this ruling on the view that the property is subject to division, and not money. Thus, if a house is being divided and one of the two partners' share is more valuable, then if one partner wishes to adjust for value monetarily and the other wishes to adjust using land, the wish of the latter is fulfilled. Thus, monetary compensations may only be used if all partners consent, since division contains an element of exchange, which requires mutual consent. However, if the judge finds it necessary to use financial side payments, he may do so.<sup>35</sup>

In what follows, we shall review the jurists' rulings for the most important cases of dividing properties. Those include dividing homes, land with buildings,

<sup>35</sup> Ibn Al-Humām ((Ḥanafī), vol.8, p.15), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.271), Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.101), Al-Kāsānī ((Ḥanafī), vol.7, p.19), *Al-Majallah* (item #1149).



a land and a home, a home and a shop, vertically neighboring properties, and roads.

### 114.4.1 Dividing homes

The Ḥanafīs agreed that if the property includes homes in different towns, then the homes in each town should be divided separately.<sup>36</sup> 'Abū Ḥanīfa further ruled that even if all the homes were in one town, each should still be divided separately, since he deemed different homes to be of different genera based on significant differences in location, etc. This is the most widely accepted Ḥanafī opinion, according to which no adjustments in division is applied, each home is divided separately, and shares may only be consolidated by mutual consent.

In contrast, 'Abū Yūsuf and Muḥammad ruled that the judge should determine whether to division by consolidation or division each home separately. They based this ruling on their view that all homes are of the same genus at least in form and fundamental usage for dwelling. Thus, they ruled that the judge should determine the method of division that maximizes the partners' benefits. On the other hand, all three principals of the Ḥanafī school agreed that small homes are to be divided by consolidation, regardless of whether or not they are adjacent, due to the great similarities of such small homes in usage.<sup>37</sup> Finally, the Ḥanafīs agreed that bathrooms, wells, and other indivisible properties may not be divided without mutual consent, to avoid causing harm to any partner.

On the other hand, the Shāfi'īs ruled that a home with heterogeneous components must be divided with compensation for value, since different parts would serve different functions.<sup>38</sup> The Mālikīs also agreed that homes must be divided either by mutual consent, or by lottery with readjustment for deviations in value.<sup>39</sup>

### 114.4.2 Land with buildings

The principal Ḥanafī jurists ruled in three different ways over the division of a piece of land that contains buildings:<sup>40</sup>

1. 'Abū Ḥanīfa ruled that the land should be divided by area, and the one who receives a better piece of land, or gets the building within his share, should compensate the others monetarily to equate the respective values. In this case, monetary compensation is introduced only based on necessity, since the Ḥanafīs otherwise do not allow such side-payments in exchange

<sup>36</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.13), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.270), Al-Kāsānī ((Ḥanafī), vol.7, p.22), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.98 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.184).

<sup>37</sup>Those opinions of the three principals of the Ḥanafī schools were considered by late Ḥanafīs to be appropriate for their time, but argued that homes as well as rooms became much more heterogeneous in later times, c.f. 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.184), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.99).

<sup>38</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.344).

<sup>39</sup>'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.262).

<sup>40</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.15).



divisions. This exception based on necessity is analogous to the case of a man appointed as guardian for his younger brother. Such a guardian does not have financial guardianship rights, but is permitted to name the dowry to satisfy the need for marriage. Thus, the 'Abū Ḥanīfa's ruling in this case agrees with the Shāfi'ī ruling for financially compensated division.

2. 'Abū Yūsuf ruled that the land and buildings should be divided based on value assessments, since that is the only way to ensure fairness. This agrees with the Shāfi'ī ruling for property-compensated division.
3. Muḥammad ruled that the partner who receives the building should first attempt to compensate his partner with a larger share of empty land to the extent possible. If fairness cannot be fully satisfied with such land-compensation, then the difference may be assessed and compensated monetarily. He ruled thus based on the view that necessity (which legitimizes the financial compensation) must be limited to its extent, and thus does not overrule the primary method of compensation with divided property.

### 114.4.3 Vacant land and a home, or a home and a shop

The Ḥanafīs ruled for partnerships over vacant land and homes, or homes and shops, the judge should division each of the properties separately, without consolidation. They based this ruling on such properties being of different genera. Thus, land would be divided based on area, and the home should be divided based on value.<sup>41</sup>

### 114.4.4 Vertically neighboring properties

If the properties to be divided include a lower level to the exclusion of what's above it and an upper level to the exclusion of what's below it, then each of the two properties should be assessed separately, and the judge must division the properties based on assessed value. Muḥammad and the majority of Ḥanafīs made this ruling based on the view that each of the two properties serves a different purpose from the other, and hence they are considered to be of different genera, requiring division by value to ensure equity.

In contrast, 'Abū Ḥanīfa and 'Abū Yūsuf ruled that such properties should be divided based on area. In this regard, 'Abū Ḥanīfa ruled that each unit of area on a lower floor is worth two units of a higher floor, while 'Abū Yūsuf ruled that units of area should be traded on par. Later jurists interpreted this difference in opinion as differences in the conventions of the two jurists' times.<sup>42</sup>

<sup>41</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.13), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.270), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.184), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.99), Al-Kāsānī ((Ḥanafī), vol.7, p.22), *Al-Majallah* (item #1148).

<sup>42</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.17), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.272), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.102), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.185).



The Ḥanbalīs ruled<sup>43</sup> that if two partners share ownership of a two-level home, and one of the partners requests that one of them take the upper level and the other takes the lower, the other partner may not be forced to accept it. Similarly, the second partner is not forced to accept the first partner's request of dividing one of the two levels alone. This ruling follows from the view that the two levels are viewed as two separate homes, and one of the partners may be harmed by such division.

If one of the partners in this case requests dividing each level separately, then the Ḥanbalīs ruled again that the other partner is not forced to accept, since the division may cause him harm. However, if one partner requests dividing both levels simultaneously, and if that causes no harm and no property compensation would be required, then the second partner must accept the division. In this case, the Ḥanbalīs ruled in agreement with the Ḥanafīs that such division must be determined based on value, to ensure equity. Simple area rules (e.g. one unit of the lower level being equal to some number of units of the upper level area) may not be used in this case unless both partners consent to such rules.

#### 114.4.5 Road division

There are a number of problems that may arise when dividing a road. In what follows, we shall consider some of those problems and the jurists' rulings thereof:

##### 1. Easement rights

If a jointly owned house is divided in such a way that one of them needs access to drainage or a road through the property of another, but the division contract did not specify that he has easement rights, the Ḥanafī jurists ruled thus:<sup>44</sup>

1. If the first partner has another means of drainage or gaining access to the road, he must seek that alternative, and may not use the other's property for such purposes. This ruling follows since the division thus did not cause harm to either partner.
2. If such alternatives were not available, the division must be voided. This ruling follows since the easement rights amount to continued joint ownership of some aspect of the second partner's share, and thus the property must be re-divided.

##### 2. Disagreement over road closure

If the partners disagree over whether or not to close a connecting road between their properties, the ruler must consider two cases:

<sup>43</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.267).

<sup>44</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.271 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.15 onwards), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.102), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.185), *Al-Majallah* (items #1143-4, 1167).



1. If it is possible for each of the partners to have their own access through roads exclusively within their properties, then the ruler may division the property and close their connecting road to maximize their benefits and fulfill maximal separation of their properties.
2. If it is difficult or impossible to have separate road access for the two properties, the ruler may build a joint road to give them both full access to the outside world.<sup>45</sup>

### 3. Disagreement over road size

If the partners disagree over the width of the road, then:

1. Roads within the house must be made of the same width and height as the gate. Thus, balconies may only be built if they are higher than the height of the door, to ensure ease of passage.
2. Roads to the outside must be made sufficiently wide for an animal to pass through.<sup>46</sup>

### 4. Road ownership

Ownership shares in a joint road are proportional to their ownership shares of the property prior to division. This ruling follows from the fact that the property was divided but the common road was not, and thus ownership shares in the road continue as they were prior to division.<sup>47</sup>

### 5. Unequal shares in the road

Jurists agree that ownership shares in the road may be unequal, even if their original ownership shares in the land and home were equal. This follows from the rule that unequal division of non-fungible properties is permissible subject to mutual consent for properties not subject to *ribā* rulings.<sup>48</sup>

## 114.5 The divider

### 114.5.1 Appointing a divider

The partners may perform the division among themselves with mutual consent, unless they include a young child, in which case they need a court-order since they have no guardianship rights over the child partner. In this regard, partners often appoint representatives for the division, or representatives may be appointed by the judge. In this regard, it is preferable if the ruler or judge

<sup>45</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.16), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.272).

<sup>46</sup>ibid., Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.185), Al-Kāsānī ((Ḥanafī), vol.7, p.29).

<sup>47</sup>ibid.

<sup>48</sup>ibid.



appoints a dedicated professional divider who is a paid public servant, so that he may perform the division tasks without being compensated by the partners. This makes matters easier for people, and avoids suspicion of unfairness. This avoidance of suspicion is important since division is similar to court justice, since it settles disputes, and produces a public good. Thus, the public servant providing that public good should be paid from the state treasury.

If no dedicated divider was appointed, then the judge may appoint one for each case, and he should be compensated by the partners for the market wages of his labor. In this case, they alone benefit from this divider's efforts, and thus must pay him out of their wealth. Moreover, the judge should insist that the divider be paid his market wages, and not restrict the profession to one person to avoid monopoly behavior and demanding excessive compensation. Moreover, the judge should not permit the dividers to collude and charge high wages, since that would harm the public.<sup>49</sup> However, it is permissible for such professionals to form a modern syndicate under the ruler's supervision, since such syndicates often do not perform as cartels to keep wages high.

### 114.5.2 Divider characteristics

The Ḥanafīs listed based on juristic approbation a set of preferred characteristics that the divider should possess:<sup>50</sup>

1. He must be just and competent, to avoid impermissible unjust division.
2. He must be appointed by the judge, since only the judge is allowed to division on behalf of children and absent individuals, and to ensure fairness.
3. He must try his utmost to seek the maximal level of justice in division. He also should not leave any joint rights (e.g. of passage, drainage, or access to drinking water) without dividing it if at all possible. Finally, the divider should not combine the shares of any of the partners without their consent, lest the division would have to be re-done.
4. He must use random assignment after division and sorting of the shares. This rule removes suspicion of favoritism, thus satisfying the relevant parties. It is also derived from the Sunnah.<sup>51</sup>

The Shāfi'īs stipulated seven conditions for the divider appointed by the judge:<sup>52</sup> Islam, legal age, sanity, freedom, being male, being just, and knowledge of mathematics and measurement to ensure competence in division. The Shāfi'īs

<sup>49</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.5), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.179), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.265), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.91 onwards).

<sup>50</sup>ibid., Al-Kāsānī ((Ḥanafī), vol.7, pp.19,26).

<sup>51</sup>Narrated by 'Aḥmad, Al-Bukhārī, and Muslim on the authority of 'Ā'isha: "Whenever the Prophet (pbuh) traveled, he always ran a lottery between his wives to determine which one would accompany him on the trip", c.f. Al-Shawkānī (, vol.6, p.217).

<sup>52</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.338 onwards), *Hāshiyat Al-Bājūrī* (vol.2, p.351), Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.372), 'Ibn Qudāmah (, vol.9, p.126).



added the further conditions of sight, hearing, speech, and accuracy, in order to ensure his eligibility for guardianship over the partners. If any of the conditions are violated, the division would only be binding by mutual consent, as if the partners performed the division themselves. Moreover, if the partners were to choose their own divider with mutual consent, then none of the above conditions apply except for the ones needed to assign him as their agent.

### 114.5.3 Multiple dividers

Division is valid with one or more dividers. In this regard, the Mālikīs stated that one divider is sufficient for divisions by lottery, since his task is merely to report on the outcome of the lottery. Thus, the Mālikīs, Shāfiʿīs and Ḥanbalīs ruled that one divider is sufficient if the division does not require assessment of property values. However, if assessment is required, then they ruled that at least two dividers would be required, since assessment is testimony that a property has some value, and testimony requires two witnesses.<sup>53</sup>

### 114.5.4 Divider wages

All jurists agree that a court-appointed divider should be paid from the state treasury if it suffices. They based this ruling on the previously mentioned arguments that his duties are similar to those of a judge, and that he provides a public service.

On the other hand, if a paid divider is selected by the partners, then they should pay his wages. In this case, 'Abū Ḥanīfa and Mālik ruled that the partners should bear equal burden for the wages of the divider, since he is paid for his work regardless of their property shares. In contrast, 'Abū Yūsuf, Muḥammad, the Shāfiʿīs and the Ḥanbalīs ruled that burdens for the divider's wage should be made proportional to the partners' property shares. They based this ruling on the view that larger shares require more work from the divider. They also reasoned that wages correspond to a cost associated with the property, and thus the partner receiving more property should pay more than one who receives less. They provided as proof for this reasoning the agreement that the wages for one who measures property with volume or weight is paid in proportion to the amount he measures, and all other tasks are thus rewarded based on their sizes.<sup>54</sup> This latter view seems to be more appropriate, since it is more conducive to ease and justice.

<sup>53</sup> Al-Dardīr ((Mālikī)A, vol.3, p.500), Al-Dardīr ((Mālikī)B, vol.3, p.665), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.339), Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.373 onwards).

<sup>54</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.19), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.5), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.265), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.179 onwards), ʿAbd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.4, p.92), Al-Dardīr ((Mālikī)A, vol.3, p.500), 'Ibn Juzayy ((Mālikī), p.286), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.340), Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.372), 'Ibn Qudāmah (, vol.9, p.126).



## 114.6 Legal status

### 114.6.1 General rulings

#### 1. Bindingness

Jurists agree that division is a binding contract, which may not be reversed or voided under normal circumstances.<sup>55</sup> In what follows, we shall list the views of the various schools regarding its bindingness:

- The Ḥanafīs ruled<sup>56</sup> that both voluntary and obligatory divisions are binding upon their completion, and thus they may not be reversed. Moreover, they ruled that obligatory divisions are binding before their completion. Thus, if a judge divided a joint property, they may not reverse the division before or after the lottery outcome is determined.

In contrast, they ruled that partners may reverse the process of voluntary division prior to its completion. This ruling follows from the fact that voluntary division is only completed upon the determination of all partner shares, and thus the process may be voided prior to completion, in analogy to sales. In this regard, if all but one of the shares have been determined, then the last share is automatically determined as the residual property, and thus the contract would be deemed completed.

- The Mālikīs went further<sup>57</sup> by ruling that all determined shares are binding upon their recipients in voluntary or obligatory divisions, and thus the recipient of a share in division is not allowed to void it.
- The Shāfiʿīs ruled<sup>58</sup> that obligatory divisions (which include sorting divisions and compensated divisions) are binding. In voluntary divisions, which they restrict to divisions with financial compensations only, the majority ruled that consent after the lottery outcome is a requirement. Thus, mutual consent is required in such divisions before and after the lottery, and the divider's assignments are not enforced without such mutual consent.
- The Ḥanbalīs ruled<sup>59</sup> in agreement with the Shāfiʿīs that obligatory divisions are binding. However, the majority of Ḥanbalīs ruled in the case of voluntary divisions that the division becomes binding upon the determination of lottery outcomes. They ruled thus based on the view that a petitioner is similar to a ruler, who utilizes a lottery and does his utmost to ensure fairness, and thus the outcome of his lottery is binding in analogy to the lottery of a ruler in obligatory divisions.

<sup>55</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.28), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.267), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.2, p.309), 'Ibn Qudāmah (, vol.9, p.125), Al-Dardīr ((Mālikī)B, vol.3, p.676), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.184), *Al-Majallah* (item #1157).

<sup>56</sup> Al-Kāsānī ((Ḥanafī), ibid.), 'Ibn ʿĀbidīn ((Ḥanafī), ibid.), *Al-Majallah* (item #1158).

<sup>57</sup> Al-Dardīr ((Mālikī)B, ibid.).

<sup>58</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.344), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), ibid.).

<sup>59</sup> 'Ibn Qudāmah (, ibid.), Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.373).



## 2. Options in divisions

- The Ḥanafis considered three types of divisions:<sup>60</sup> (i) ones dissenting partners are not forced to accept (e.g. properties of different genera), (ii) ones they are forced to accept due to fungibility of the joint property, and (iii) ones they are forced to accept for other reasons (e.g. non-fungibles of varying qualities, e.g. livestock). They also recognized three types of options: (i) options stipulated as conditions, (ii) defect options, and (iii) inspection options.
  1. In dividing properties of different genera, all three types of options are established and dissenting partners are not forced to accept the division. This ruling follows from the fact that such division can only be seen as an exchange, and thus inherits the rulings for sales.
  2. In dividing fungible properties, dissenting partners are forced to accept the division, but the defect option is established to prevent harm and injustice. In contrast, condition and inspection options are not established in this case, since they serve no purpose and prevent no harm.
  3. In dividing non-fungibles of varying qualities, dissenting partners are forced to accept the division of properties of the same genus, but not forced to accept division of properties of different genera. In this case, the Ḥanafis agree that the defect option is established to prevent harm. Most Ḥanafis further stipulated that condition and inspection options are also established in this case.
- Most Mālikīs ruled<sup>61</sup> that defect options are established in voluntary divisions, in analogy to sales.
- The Ḥanbalīs ruled that the defect option applies if a partner discovers a previously unknown defect in his share. In this case, the adversely affected partner has the option of voiding the division, or seeking compensation for the defect. This ruling is based on the view that the defect thus caused a diminution in his portion, which he owned by virtue of the division just as a buyer owns what he bought.
- The Shāfiʿīs merely mentioned that sorting divisions are voided if injustice or mistakes in division are discovered. On the other hand, they considered divisions with property adjustments or financial compensations to be types of sale, and thus establish the defect option for those two types.<sup>62</sup>

<sup>60</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.265), Al-Kāsānī ((Ḥanafī), vol.7, p.28), *Al-Majallah* (items#1153-1155).

<sup>61</sup> Al-Dardīr ((Mālikī)B, vol.3, p.662 onwards), Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.267).

<sup>62</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.344).



### 3. Consequences of division

Divisions have the following consequences:<sup>63</sup>

1. Each partner's share is identified independent of the others' shares, and he thus has full ownership of his share after division.
2. After division, each partner has full ownership of his share established, and thus may deal in it as any full owner may, e.g. he may sell it, lease it, pawn it, demolish or build it, etc.
3. No preemption rights are recognized in division. This follows from the fact that preemption rights only apply to pure exchanges, while division is only partially an exchange and thus does not qualify for preemption rights.

It appears that all schools of jurisprudence agree on this legal status ruling.<sup>64</sup>

### 4. Voiding divisions

Divisions may be voided by revocation or mutual consent. In this regard, a division may only be voided after its completion. Since the Ḥanafis view divisions after their completion to be binding, they enumerated cases where extraordinary circumstances still dictate its voiding:

1. Discovery of a debt:
  - The Ḥanafis ruled If an inheritance is divided, and then it is discovered that the deceased had a debt that would consume the divided property, the division is thus voided if he had no other property. However, if the heirs repay the debt out of their own properties, if the creditors of the deceased absolve the heirs of their liability, or if the remainder of the inheritance is sufficient to repay the debt, the division would not be voided. In the latter three cases, the reason for overruling the bindingness of the division would cease to exist, and hence the division would remain binding.

As proof for the validity of voiding divisions in this case, jurists referred to the verse: "... after any will or debt" [4:11]. Moreover, if the debt consumes the property, the heirs would have no ownership right established therein. In this case, the owner of the property continues to be the deceased, with an attached right therein established for the creditors. In this regard, ownership rights of others in a property prevent the validity of its division.

On the other hand, if debt was smaller than the value of the inheritance, the creditors would thus have an established right in the inheritance equal to the value of the debt. This ownership right

<sup>63</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.28), *Al-Majallah* (item #1162).

<sup>64</sup> Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.306), 'Ibn Qudāmah (, vol.9, p.121).



would be distributed as a common share in the entire inheritance, thus preventing execution of the division.<sup>65</sup>

This opinion seems to be the most appropriate, to protect the rights of creditors.

- The Ḥanbalīs ruled<sup>66</sup> that the division of an inheritance is not invalidated when a debt of the deceased is discovered. They based this ruling on the view that the attachment of a debt to the inheritance does not prevent dealing therein, since it would constitute the attachment of a right to the inheritance without the heirs' permission.
  - The Shāfi'īs ruled<sup>67</sup> that the effect of discovering a debt of the deceased on the division depends on the division's classification. Thus, if the division is a mere sorting of rights, it would not be voided by the discovery of that debt. On the other hand, if the division is classified as a sale, then it would void the division due to the attachment of the creditors' right to the property. On the other hand, if the debtor were to repay the debt, then that right would no longer exist, and the division would not be voided.
2. If another heir or person named in the will is discovered after a voluntary division is completed, the division would thus be voided. This ruling follows from the fact that that heir or inheritor was in fact a partner of the other heirs who completed the division. On the other hand, most jurists agreed that obligatory divisions would not be voided in this case. The latter ruling is based on the view that an obligatory division is based on the best judgment of a judge in a sphere of *'ijtihād* (juristic reasoning), and thus it must be executed and may not be voided.<sup>68</sup>
  3. If an obligatory or voluntary division is completed, and then found to contain significant injustice (beyond reasonable variance in assessments), the Ḥanafī jurists agree that the division would thus be void. This ruling is based on the principle that a judge's dealing is meant to effect justice. Thus, if significant injustice took place without the owner's consent, the judge's dealing inherits the legal status of the sale of a child's property by his father or plenipotentiary, i.e. it is voided.

In this regard, the claim of significant injustice is only considered as long as the claimant had not previously declared that he received his full right. Otherwise, the declaration and the claim would contradict one another, and the claim would be ignored. Moreover, claims of minor injustice (within the normal range of assessment error) are not considered, and its proofs are ignored.<sup>69</sup>

<sup>65</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.30), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.187), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.26), *Al-Majallah* (item #1161).

<sup>66</sup> 'Ibn Qudāmah (, vol.9, p.129).

<sup>67</sup> 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.310).

<sup>68</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.30), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.187).

<sup>69</sup> 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.187), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.273), *Al-Majallah* (item #1160).



Other jurists agreed with the ruling to void divisions that contain significant injustice.<sup>70</sup> On the other hand, the Shāfi'is considered many more cases, as we shall see under mistakes in division.

4. If one of the partners declares that he had received his full share, and then claims that some of his share was given to another by mistake, his claim is not accepted unless he provides a material proof, his opponent admits it, or refuses to take an oath. This ruling follows from the fact that the claimant thus claims that the division was voided after it was completed, and thus a proof is required. In this regard, his declaration and his claim are not viewed to contradict one another, since he may have relied on the actions of a trustworthy person, and then discovered that the latter made a mistake.

If no proof is provided, all claimant's partners are asked to support their claims by oath. Then, if any of them refuses to take an oath, his property should be consolidated with the claimant's, and the joint property must be re-divided in proportion to their shares. In this case, refusal to take an oath is taken as proof against the specific partner who refused to take it.

If the claimant had not previously declared receipt of his full share, all partners would be asked to take an oath, and then the division would be voided. In this case, the disagreement would pertain to the amount received after the division, and thus would be judged in analogy to differences over the amount of an object of sale.

If the claimant had not previously declared receipt of his full share, and he charged that part of his share was given to a particular partner who denied it, then the two would take oaths, and the division would be voided. In this case also, the disagreement is analogous to disagreements over the amount of an object of sale.

On the other hand, if the claimant had declared receiving his share, and then claimed that another received part of it, his opponent's counter-claim would be accepted if backed by his oath. This ruling follows from the fact that the claimant is thus claiming that his partner usurped his property, while the latter is denying it, and the denier's counter-claim is always accepted if backed by his oath.<sup>71</sup>

Jurists also agree that the division would be voided if one of the partners claims that there was an error in distributing shares, and provides a material proof.<sup>72</sup> However, the Shāfi'is ruled that obligatory and voluntary mere sorting divisions are voided if a mistake or injustice is established with a valid proof (two respected male witnesses, one male and two female

<sup>70</sup>Al-Dardīr ((Mālikī)B, vol.3, p.677), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.355), 'Ibn Qudāmah (, vol.9, p.127).

<sup>71</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.20 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.186), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.186), 'Abd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.4, p.103 onwards), Al-Kāsānī ((Ḥanafī), vol.7, p.26).

<sup>72</sup>ibid.



witnesses, or one witness and the claimant's oath). In contrast, they ruled that adjusted or compensated divisions are not voided thus, since they are types of sales. In all cases, if no proof is provided, the claimant may demand that his opponent take an oath to support his counter-claim.

5. The Ḥanafīs considered three cases in which a judge establishes entitlement to the divided property for another party:<sup>73</sup>

- (a) If the entitled portion was an unidentified share in all of the divided property, all Ḥanafīs agree that the division would be voided, since the essence of sorting and demarcation would not have occurred.
- (b) If the entitled portion was a specific part of the share of one of the partners, all Ḥanafīs agree that the division would not be voided. They based this ruling on the view that the entitled party's ownership of one specific part does not establish partnership in all of the property, and thus the division is not invalidated. In this case, the recipient of the share must return the entitled part to its claimant, since his ownership of that part was thus negated, and demand compensation from the other partners whose ownership of that part was also negated.
- (c) If the entitled portion was an unidentified portion spanning more than one share, 'Abū Ḥanīfa and Muḥammad ruled that the recipient of those shares are not forced to accept the voiding of their division. Instead, they are given the option to void the division, or to demand compensation for the entitled amount from their other partners. This option is thus established since the division was only deemed invalid for the entitled portion.

In contrast, 'Abū Yūsuf ruled that the division would be voided in this case. He based his ruling on the view that the entitled party was in fact an additional partner who was absent at the time of division. Thus, he ruled in analogy to the case where the entitlement pertained to an unspecified but fixed percentage of all the shares.

In those cases the Shāfi'īs and Ḥanbalīs ruled<sup>74</sup> that the division is voided if entitlement is established in a specific portion of one partner's share (or if most of the entitlement was in one partner's share). They based this ruling on the fact that one of the partners would thus be required to demand compensation from his other partners to attain justice in the division.

On the other hand, if the entitled part was a specific portion equally distributed over the divided shares, then the division is not voided.

<sup>73</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.23 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.274), 'Ibn 'Abidīn ((Ḥanafī), vol.5, p.186 onwards), 'Abd Al-Qḥanī Al-Maydānī ((Ḥanafī), vol.4, p.106), *Al-Majallah* (item #1145).

<sup>74</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.309), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.344), 'Ibn Qudāmah (, vol.9, p.128), Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.376).



In this case, the ruling relies on the fact that the rights of the various partners would have been correctly sorted.

In contrast, if the entitled part was distributed as an unspecified portion in one or more of the divided shares, the division would be voided for that part. However, the majority of Shāfi'is ruled that the division would remain valid for the rest of the property, based on the principle of partitioning of a contract. On the other hand, the Ḥanbalīs ruled that the entire division (obligatory or voluntary) would be voided in this case. They based their ruling on the view that the entitled party was an absent partner at the time of division, and without his permission. Moreover, they agreed with the reasoning of 'Abū Yūsuf that demarcation of the different rights of the partners would thus not have taken place.

### 114.6.2 Rulings pertaining to proofs

For the remainder of this chapter, we shall consider specific legal status rulings pertaining to resolving division disputes between partners, when their proofs contradict one another. Those include disputes over boundaries of their properties, assessment of the degree of injustice, or one partner being in possession of the other's property.

#### 1. Disputes over boundaries

If two parties to a division of land claims ownership of a house owned by the other that falls in his allotted piece of land, and each presents proof for his claim, each would be given ownership of the house he claimed. This ruling is based on the grounds that each claimed house lies within the land of each claimant, and outside the land of his opponent. Thus, this distribution of land containing the homes would supersede the possession claims for the homes.

If one partner provided proof that the other is in possession of his home, which possession resulted from the division of land, the proof is accepted, even if the defendant denied the charge. If neither partner had proof for his claim, then they would each take an oath to support his claim, and then they would return each other's properties (in analogy to sales),<sup>75</sup> and the division is thus voided.<sup>76</sup>

#### 2. Assessing the extent of injustice

If two partners disagree over the amount of injustice in a division, we need to consider the cases of minor injustice and excessive injustice:

<sup>75</sup>Narrated by 'Abdullāh ibn 'Aḥmad in *Ziyādāt Al-Musnad* on the authority of Al-Qāsim ibn 'Abdulrahman on the authority of his grandfather the *Ḥadīth*: "If the buyer and seller disagree, the merchandise is still intact, and neither one can provide proof for his claim, they must thus exchange oaths", c.f. Al-Shawkānī (, vol.5, p.224).

<sup>76</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.26), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.22 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.274), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.186).



1. If the injustice is minor and within the bounds of normal assessment errors, the claim is ignored both in obligatory and voluntary divisions, since avoiding such minor injustice is very difficult.
2. If the injustice is excessive, exceeding the bounds of normal assessment errors,<sup>77</sup> then we must consider whether the division was obligatory or voluntary. If the division was obligatory, the division would be voided, since the judge's role of ensuring justice was not realized, and the partners did not consent to the division. On the other hand, if the division was voluntary, a few Ḥanafī jurists ruled similarly that the claim is ignored, arguing that such divisions are tantamount to sales, in which claims of injustice do not void the contract.<sup>78</sup> This ruling would not apply to sales by a party other than the owner (e.g. father or plenipotentiary; or in obligatory divisions by the judge), since such sales would be voided based on significant injustice.<sup>79</sup> On the other hand, we have already seen that the majority of Ḥanafīs agree that the claimant's claim would be accepted in this case, and the division (obligatory or voluntary) would be voided based on such significant injustice, since justice is a condition for the permissibility of division.

### 3. Disputes over receipt of one's share

We consider two cases in which partners disagree after division whether or not one of them received his share:

1. If two or more dividers testify that the claimant did receive his share, 'Abū Ḥanīfa and 'Abū Yūsuf ruled that their testimony would be accepted. They based this ruling on the view that they would thus be testifying to the action of a third person, which is receipt, rather than their own action, which is demarcation of the shares and that requires no testimony.  
  
In contrast, Muḥammad ruled that the testimony of the dividers is not accepted in this case, since he deemed the object of the testimony to be their act of demarcation of shares in the divided property.
2. If only one divider testifies that the claimant had in fact received his share, it counts as a single testimony against another, and thus it is insufficient to challenge the claim.<sup>80</sup>

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<sup>77</sup>Later Ḥanafīs determined that the demarcation for excessive injustice is 5% for movable objects, 10% for animals, and 20% for immovable objects.

<sup>78</sup>In this regard, significant injustice by itself is not deemed by most jurists to negate consent, unless it is accompanied by deception (e.g. hiding defects in the merchandise). Proof for this position is given in the *Ḥadīth*: "Let people benefit from one another".

<sup>79</sup>'Ibn Al-Humām ((Ḥanafī), vol.8, p.22), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.273 onwards).

<sup>80</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.185 onwards).



## Chapter 115

# Dividing Usufruct

The topic of this chapter will be covered in five sections:

1. Definition and legality of dividing usufruct.
2. The object of divided usufruct.
3. Characteristics of dividing usufruct.
4. Types of usufruct division.
5. Actions allowed for each partner after a division of usufruct.

### 115.1 Definition and legality

#### 115.1.1 Definition of alternating use

The term (*al-muhāya'ah*) is used to indicate the division of usufruct (usually temporally). The Arabic name suggests the nature of the contract: that each partner uses the usufruct of the property in the same manner as the other partner.<sup>1</sup>

In this regard, the Mālikīs defined usufruct division as separation of each partner's right from the rights of other partners in a single object (e.g. one house), or multiple objects (e.g. multiple homes) by extracting usufruct of the single object or multiple objects in specified time periods.<sup>2</sup> Thus, they stipulated specification of the time periods of usage as a condition of usufruct division, otherwise the extent of usufruct extraction would be unknown, and the contract would be deemed defective.

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<sup>1</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.27), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.189), *Al-Majallah* (item #1174).

<sup>2</sup>Al-Dardīr ((Mālikī)B, vol.3, p.660).



### 115.1.2 Legality of usufruct division

The contract is deemed permissible based on juristic approbation, since this procedure is needed in cases where simultaneous extraction of usufruct is impossible. The object of this contract is the usufruct of a jointly owned physical property, the usufruct of which can be extracted without consuming the object itself. The contract is not invalidated by the death of one or more of the partners. If one of the partners requests physical division of the joint property, then the alternating use contract becomes invalid.<sup>3</sup>

The latter ruling follows from the fact that physical division is stronger than alternating use (or division of usufruct), since consolidation of all usufruct perpetually is better than alternating their assignment over successive time periods.<sup>4</sup> Thus, if one partner requests physical division and the other requests dividing the usufruct, the judge should accept the request of the former and division the property physically.

Jurists also found proof for the legality of usufruct division in the Qur'ān and Sunnah:

- In the Qur'ān, they found proof in the alternating drinking rights for the she-camel of Ṣāleḥ (pbuh): “here is a she camel: she has a right of watering, and you have a right of watering on the appointed day” [26:55], which is an exact description of the alternating use division of usufruct.
- There are a number of occasions in the Sunnah supporting the practice. For instance, it is narrated that the Prophet (pbuh) designated the riding services of each of the army's seventy camels to three people, who took turns riding it.<sup>5</sup>

## 115.2 Object of usufruct division

We have seen that the object of the contract is usufruct, and not the physical property itself. Thus, it is permissible for two partners to agree that one of them reside in one part of a jointly owned house, and the other one reside in the other. Similarly, it is allowed for one partner to reside upstairs and the other to reside downstairs in a jointly owned property, even if one of the partners rents his portion and collects the rent.

On the other hand, it is not permissible to division the usufruct of palm trees or other types of trees between partners, such that each partner will invest in some of the trees. Similarly, it is not permissible to division jointly owned sheep so that each partner will benefit from the milk of a specific number of the sheep. This follows from the fact that the fruits of trees and milk of sheep are physical properties, and thus cannot be made object of usufruct division. All

<sup>3</sup>Ibn ʿĀbidīn ((Ḥanafī), *ibid.*), ʿAbd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.4, p.106).

<sup>4</sup>Ibn Al-Humām ((Ḥanafī), vol.8, p.27).

<sup>5</sup>Sīrat ʿibn Hishām (vol.1, p.613).



jurists agree on this distinction between dividing usufruct and dividing physical property.<sup>6</sup>

In this regard, the Shāfi'is ruled that fungible debts established as liabilities cannot be divided, even if by mutual consent. If debts are divided thus, the partners would not own whatever they take. *Al-Majallah* (item #1175) stated the same principle as follows: "divided usufruct only applies to non-fungible properties, such that the property can survive the usage of the partners".

### 115.3 Characteristics of usufruct division

The non-Mālikīs ruled that usufruct division is non-binding, and the Mālikīs ruled that it is binding. In what follows, we list the rulings of each school:

- The Ḥanafīs ruled<sup>7</sup> that temporal or special division of usufruct is a non-binding contract. Thus, if one partner requests dividing the property, and another requests dividing the usufruct, the first request is accepted. They ruled thus based on the view that dividing the physical property is stronger than dividing the usufruct, since it is more appropriate to consolidate all the usufruct in one place perpetually than to alternate usage.<sup>8</sup>

Thus, they ruled that usufruct division is a permissible contract that can be voided by any of its parties, without need for excuses. Moreover, the contract is not invalidated by the death of one or more of the partners. This is in contrast to the ruling for leases. The ruling for usufruct division is based on the view that a judge may resume the contract at any time, and its voiding is useless since any of its parties can void the contract unilaterally.

On the other hand, 'Ibn 'Ābidīn reported the Ḥanafī opinion that obligatory usufruct division is a binding contract. Thus, voiding such a contract requires mutual consent, and may not be done unilaterally without a valid excuse.

- The Shāfi'is ruled<sup>9</sup> that usufruct division is a non-binding contract. Thus each of the partners may void it at any time. Moreover, they ruled that usufruct division cannot be made obligatory by court order.
- The Ḥanbalīs ruled<sup>10</sup> that usufruct division is a non-binding contract. Thus, each of the partners may void the contract at any time. They further agreed with the Shāfi'ī ruling that usufruct division cannot be

<sup>6</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.32), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.277), 'Ibn Juzayy ((Mālikī), p.285), Al-Dardīr ((Mālikī)A, vol.3, p.498), Al-Dardīr ((Mālikī)B, vol.3, p.660 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.345), 'Ibn Qudāmah (, vol.9, p.130), Al-Buhūtī (3rd printing (Ḥanbalī), vol.6, p.367).

<sup>7</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.32), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.184,189), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.276).

<sup>8</sup> See *Al-Majallah* (item #1182).

<sup>9</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.345).

<sup>10</sup> 'Ibn Qudāmah (, vol.9, p.130).



made obligatory, in analogy to sales that require mutual consent. Finally, they agreed with the Ḥanafīs that if any partner requests physical division of the joint property, the usufruct division would thus be voided.

- In contrast, the Mālikīs ruled<sup>11</sup> that usufruct division, like leases, are binding contracts. Thus, they ruled that it can only be voided by mutual consent, and no partner has the right to void it unilaterally.

## 115.4 Types of usufruct division

There are two major dimensions of differentiation between usufruct division contracts. The first dimension pertains to whether the division is voluntary or obligatory. The second pertains to whether its nature is temporal or spatial.

### 115.4.1 Voluntary vs. obligatory usufruct division

All jurists ruled that voluntary usufruct division is permitted, whereby partners will agree to divide the usufruct of a jointly owned property either temporally or spatially. The Ḥanafīs also ruled that obligatory usufruct division (temporal or spatial) is permissible based on a request by one or more of the partners, to ensure that all the partners' benefits are considered.<sup>12</sup> Thus, they reasoned that people sometimes need to attain justice, and a court-ordered division of usufruct can answer that need.

In this regard, *Al-Majallah* (item #1181) discussed at length the conditions under which obligatory usufruct divisions are permitted:

If one partner in multiple properties requests usufruct division, and his partner refuses to do so, then obligatory usufruct division is possible if the jointly owned properties had the same type of usufruct, and impossible otherwise.

For instance if two partners share ownership of two homes, and one of the partners requests that he be allowed to live in one, and allow his partner to live in the other, obligatory usufruct division in that manner is implemented if his partner refuses. Similarly, if the two partners owned two animals, one can be forced to use one and allow the other to use the other upon the request of his partner.

On the other hand, if a partner requests that he be allowed to live in a house while the other collects rents of a bath, or that one resides in a home and the other can utilize their farm, usufruct division is only possible by mutual consent. Thus, if the other partner refuses the request of the first, he may not be forced to act according to that request.<sup>13</sup>

<sup>11</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.266), 'Ibn Juzayy ((Mālikī), p.285).

<sup>12</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), ibid.), *Al-Majallah* (item #1176), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.276).

<sup>13</sup>Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.276), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.30).



On the other hand, the Mālikīs, Shāfiʿīs, and Ḥanbalīs ruled<sup>14</sup> that usufruct division is a form of exchange, and thus no partner should be forced to accept it, in analogy to sales that require mutual consent. Moreover, they reasoned that each of the partners has an immediate right to the usufruct, which may only be postponed if he consents, in analogy to postponement of debts. Thus, the non-Ḥanafī jurists do not allow obligatory usufruct division.

Moreover, the Mālikīs ruled that usufruct division may not be implemented by a lottery. On the other hand, the Shāfiʿīs ruled that if the partners agreed to division the usufruct, and then disagreed over the order of usage, a lottery may be used to determine the order.

### 115.4.2 Spatial vs. temporal division of usufruct

The Mālikīs only recognized two types of usufruct division:<sup>15</sup> physical division, and temporal division of usufruct. The latter refers to sequential usage of the property for fixed time periods, e.g. each partner may use the house for a month, and then await his turn after each of the other partners takes his, etc.

The former refers to dividing the jointly owned properties so that each may use it for a fixed time period. For instance, one may live in one house for one month, and the other may live in the other house for a month, etc.

#### 1. Temporal division of usufruct

##### 1-a. Definition

This form of usufruct division dictates that partners should take turns making full use of the jointly own property, where the periods of usage are proportional to their ownership shares.<sup>16</sup> In this regard, *Al-Majallah* (item #1187) stated that usufruct division cannot be applied by division of physical output (e.g. each partner receiving fruits of some jointly owned trees, or milk from some of the jointly owned sheep, etc.).

##### 1-b. Legality

Temporal usufruct division is clearly legalized by the above referenced verse [26:155] referring to the sequential drinking rights for camels, as well as verse “and tell them that water is to be divided between them, each one having the right to drink in his turn” [54:28]. It is also legal due to people’s need for such a means of sharing joint property.

##### 1-c. Juristic characterization

The Ḥanafīs ruled that temporal division of usufruct has elements of sorting, and elements of exchange, in analogy to physical division. They ruled thus

<sup>14</sup>Ibn Juzayy ((Mālikī), p.285), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.4, p.345), Ibn Qudāmah (, vol.9, p.130).

<sup>15</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.3, p.266), Ibn Juzayy ((Mālikī), p.285).

<sup>16</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), ibid.), *Al-Majallah* (item #1176).



based on the view that the partner using the property at any point in time is in fact borrowing his partners' shares, establishing the exchange aspect.<sup>17</sup> It is because of this exchange aspect that specification of the time periods of usage is required.

The Ḥanbalīs ruled that division of usufruct is a pure exchange contract. Thus, they inferred that such contracts cannot be made obligatory, in analogy to sales, which require mutual consent.<sup>18</sup>

The Shāfi'īs ruled that any partner who extracts more than his share of the usufruct must compensate his partners for the market rent of the excess usufruct he extracted.<sup>19</sup> This ruling clearly implies that they considered division of usufruct an exchange contract.

In this regard, *Al-Majallah* (item #1178) stated the following: "temporal usufruct division is a type of exchange. Thus, the usage right of one partner is exchanged for the usage right of another during his turn".

#### 1-d. Period specification

Temporal usufruct division requires specification of the time periods of usage by each partner, while spatial usufruct division does not. This ruling follows from the fact that specification of the time periods is required to determine the amount of usufruct given to each partner. Without such determination, the object of the contract would be unknown. In contrast, spatial usufruct division determines usufruct spatially, and thus its object can be known without specifying time periods for each partner.<sup>20</sup> Thus, *Al-Majallah* (item #1178) stated that since temporal usufruct division is a type of exchange, the specification of time periods of usage for each partner is required.

The Mālikīs further stipulated restrictions on the allowed time periods for each partner, beyond the fact that specification is required to avoid uncertainty.<sup>21</sup> Thus, they ruled that movable objects (e.g. animals, clothes, etc.) require short usage periods for each partner. In contrast, usage periods may be long for immovable objects (e.g. houses, owned land, etc.). On the other hand, they ruled that land that is not owned by the partner (e.g. if it is borrowed) cannot be an object of usufruct division, no matter how short the usage periods are made. The latter ruling is based on the fact that the borrowed land may be returned before a partner gets his turn to use it.

#### 1-e. Termination

We have seen that usufruct division is not voided upon the death of one or more of the contracting parties, since it may be resumed upon its voiding.

<sup>17</sup> Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.276).

<sup>18</sup> Ibn Qudāmah (, vol.9, p.130).

<sup>19</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.345).

<sup>20</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.32).

<sup>21</sup> Al-Dardīr ((Mālikī)A, vol.3, p.449), Al-Dardīr ((Mālikī)B, vol.3, p.661), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.266).



Thus, usufruct division is only terminated upon the mutual agreement of the partners, e.g. by selling the joint property.

## 2. Spatial usufruct division

### 2-a. Definition

In spatial division of usufruct, each partner is given some of the joint property, in proportion to his ownership share, and all the partners use the properties allocated to them simultaneously.<sup>22</sup> For instance, one partner may be given the usufruct of one part of a house, while another partner may be given the usufruct of another part.

### 2-b. Legality

Spatial usufruct division is legal, since it is a type of division similar to physical division of joint properties.<sup>23</sup> In this regard, both temporal and spatial division of usufruct are made legal due to necessity if it is not possible for the partners to utilize the entire property simultaneously.

### 2-c. Object of the contract

Spatial usufruct division may be applied to jointly owned properties that can be divided spatially (e.g. a large house). In contrast, it cannot be applied to indivisible properties such as a single car, a single animal, a book, or a small house. Of course, temporal usufruct division would still be possible for such physically indivisible properties.

Thus, we can see that homes can be objects of temporal or spatial usufruct division, whether for personal use or to lease. This ruling follows since real estate rarely changes. In this regard, spatial division of the usufruct involves a full sorting of the partners' shares, while temporal division is tantamount to lending the property, whereby each partner is viewed as an agent for the others during their turn to use the property.<sup>24</sup>

In the case of joint owned animals, 'Abū Ḥanīfa ruled that usufruct division is not allowed for personal use or rental, since animals change over time, and their usufruct depends on the user's abilities. In contrast, 'Abū Yūsuf and Muḥammad ruled that usufruct division is permissible for personal usage of one or two jointly owned animals, while it is allowed for leasing only for two animals, but not for one. They based the latter ruling on the view that equity can be assured in the case of two animals, since they can be used simultaneously. In

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<sup>22</sup> *Al-Majallah* (item #1179).

<sup>23</sup> *Al-Zayla'ī* ((Ḥanafī Jurisprudence), vol.5, p.276), *Al-Kāsānī* ((Ḥanafī), vol.7, p.31), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.27).

<sup>24</sup> *Al-Zayla'ī* ((Ḥanafī Jurisprudence), vol.5, p.276), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.30), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.189), *Al-Majallah* (item #1176).



the case of one animal, however, they said that animals change over time, and thus its usufruct in later time periods will be less than in earlier periods.<sup>25</sup>

*Al-Majallah* (item #1177) listed the opinion of 'Abū Yūsuf and Muḥammad that one animal's usufruct may be made the object of temporal division for personal use. It also allowed spatial division of the usufruct of two animals, but allowing each partner to use one. This ruling also agrees with the Mālikī notion of physical division of usufruct.

#### 2-d. Characterization

Spatial division of usufruct is a mere sorting of shares, and thus does not contain any element of exchange. Indeed, had it contained an element of exchange, it would be deemed invalid based on exchanging properties of the same genus with deferment. In this regard, recall that unity of genus is sufficient in the Ḥanafī school to establish the occurrence of the forbidden deferment *ribā*.<sup>26</sup>

#### 2-e. Period

The Ḥanafīs ruled that it is not necessary to specify the time period in spatial division of usufruct, in contrast to the ruling for its temporal counterpart. In the spatial division case, the usufruct is known spatially, and thus does not require an additional temporal specification.<sup>27</sup> In contrast, the Mālikīs ruled that specification of the time period is required even in physical division of usufruct.

#### 2-f. Termination

The same rulings that apply to termination of temporal division of usufruct apply to the spatial division. Thus, the contract is not terminated upon the death of any partner, each partner has the right to void it whenever he wishes, and the contract is terminated by mutual consent, e.g. if the joint property is sold.<sup>28</sup>

### 115.5 Permitted actions after division

In both temporal and spatial division of usufruct, the partners are allowed to use their allotted share as they wish, through personal usage, leasing, or lending. In spatial division of usufruct, those rights are established for each partner, whether or not they are stipulated as conditions in the contract, and whether or not the joint property for which the usufruct was divided was a single home or

<sup>25</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.277), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.30 onwards), Al-Kāsānī ((Ḥanafī), vol.7, p.32), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.190).

<sup>26</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.276), *Al-Majallah* (item #1179).

<sup>27</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.32), *Al-Majallah* (item #1179).

<sup>28</sup> *Al-Majallah* (item #1191) stated: "division of usufruct is not terminated upon the death of one or all of partners".



multiple homes. This ruling is based on the fact that spatial division of usufruct does not contain an element of borrowing from one's partners, thus each partner fully owns the usufruct of what he is given, and may use it as he sees fit.

In contrast, Ḥanafīs are in agreement that temporal division of usufruct does not give a partner the right to lease the property during his turn to use it, if such a right is not stipulated as a condition in the contract. If the contract does contain such a clause of rights to lease during one's turn, then the Ḥanafī jurists differed in opinion:

1. The majority of Ḥanafīs accept the ruling of Al-Qadūrī that partners would still not have the right to lease the property during their turn, since the contract contains an element of borrowing, and borrowed properties may not be leased.
2. Muḥammad ruled in *Al-'Aṣl* that the joint owners of a single home may take turn living in it, or extracting its output. This was originally inferred to legitimize leasing the home during one's turn. However, later Ḥanafīs reasoned that this text adopted from an earlier source was misinterpreted in *Al-'Aṣl*, since "output" (*al-ghallāh*) is different from utilization by renting (*al-'istiqlāl*). In this regard, they argued that the former term implies a physical output, while division of usufruct deals only with usufruct and not with physical properties.<sup>29</sup>

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<sup>29</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.32 onwards).



## Part XXI

# Usurpation and Destruction of Property



## Preliminaries

Al-Kāsānī said that there are two main types of felonies: those perpetrated against animals and inanimate objects, and those perpetrated against human beings. He further classified transgressions against animals and inanimate objects into: usurpation (*ghaṣb*) and destruction (*'itlāf*).<sup>30</sup> The latter two types of transgression result in guaranty of the usurped or destroyed property or legal rights of others, and thus require financial compensation. Assaults on people's properties fall under that category of destruction and resultant guaranty.

In this part, we shall study the two forms of transgression in two separate chapters:

1. Usurpation and its legal status rulings.
2. Property destruction and its legal status rulings.

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<sup>30</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.233).



## Chapter 116

# Usurpation and Its Status Rulings

The outline of this chapter is as follows:

- Section 1: definition of usurpation, its prohibition, and juristic rulings for its demarcation.
- Section 2: worldly and religious status rulings for usurpation:
  - Sinfulness and accountability.
  - Returning usurped property if it exists.
  - Guaranteeing usurped property if it perishes:
    1. Methods of guaranty.
    2. Time of establishing guaranty.
    3. What relieves the usurper of guaranty.
      - (a) Changes in usurped property, or their mixture with other property.
      - (b) Diminution in usurped property.
      - (c) Growth in usurped property, and the legal status of added buildings, plants, or trees, in usurped land.
      - (d) Usufruct and output of usurped property.
      - (e) Disputes between usurper and owner of the usurped property.
      - (f) Usurpation of already usurped property.



## 116.1 Prohibition, definition, and demarcation

### 116.1.1 Prohibition of usurpation

Proofs abound in the Qur'ān, Sunnah, and consensus of the scholars, that usurpation is forbidden.<sup>1</sup>

- Proof in the Qur'ān is found in the verses: “O people of faith, do not devour each other’s property unjustly, unless it is a trade with mutual consent” [4:29], and “and do not devour each other’s property unjustly, nor use it to bribe judges and devour limited properties of others sinfully, and with full knowledge” [2:188].
- Proof from the Sunnah is derived from the Ḥadīth: “Your blood, and your property, are as sacred for you as the sacredness of this day, this month, and this city”.<sup>2</sup> Further proof is provided by the Ḥadīths: “The property of a Muslims is forbidden for other Muslims, except with his consent”,<sup>3</sup> “Whoever takes a square foot of land unjustly will be raised on the day of resurrection with that piece of land around his neck, seven earth-depths away”,<sup>4</sup> “Every hand is indebted for whatever it took until it is returned”,<sup>5</sup> and similar Ḥadīths.
- Finally, Muslims have reached a consensus that usurpation is forbidden, and that it is a great sin even if the usurped property is too small to consider the violation a theft.

### 116.1.2 Definition of usurpation

Usurpation refers in language to taking a property by force unjustly. Ḥanafī jurists gave it a very different juristic interpretation from the one given by the non-Ḥanafīs:

- The Ḥanafīs defined usurpation<sup>6</sup> as taking a valued property with a respected property right, without the owner’s permission, in a manner that negates the owner’s possession of the property.
  - In this regard, the taking of property covers usurpation as well as other activities.

<sup>1</sup>Ibn Qudāmah (, vol.5, p.220), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.83).

<sup>2</sup>Narrated by Al-Bukhārī and Muslim on the authority of ‘Abū Bakrah (mAbpwh). Also narrated by Muslim on the authority of Jābir as part of the Prophet’s (pbuh) speech in Mina on the day of sacrifice, c.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.73).

<sup>3</sup>Narrated by ‘Abū ‘Ishāq Al-Jawzījānī, and also narrated by Al-Dāraqūṭnī on the authority of ‘Amr ibn Yathribī, c.f. Al-Shawkānī (, vol.5, p.316), Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.169).

<sup>4</sup>Narrated by ‘Aḥmad, Al-Bukhārī and Muslim on the authority of Sa‘īd ibn Zayd, c.f. Al-Shawkānī (, vol.5, p.317).

<sup>5</sup>Narrated by ‘Aḥmad and the four authors of *Sunan* books, and deemed valid by Al-Ḥākim on the authority of Samurah ibn Jundub, c.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.67).

<sup>6</sup>Ibn Al-Humām ((Ḥanafī), vol.7, p.361 onwards), ‘Abd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.188).



- The Ḥanafīs explicitly specified that the property must be valued to exclude un-valued properties such as pork and wine, and required the property rights to be respected to exclude ownership by an enemy of Islam.
- They explicitly specified that usurpation must be taking the property without the owner’s consent to exclude properties taken as a gift, or through a contract-based exchange.
- Finally, they specified that usurpation must involve negation of the owner’s possession of the property, thus excluding growth of usurped property (e.g. offspring, fruits, etc.) from the guaranty caused by usurpation of the property.

Thus, the Ḥanafīs consider significant usage the property of another (e.g. using the animal of another for transportation) as a form of usurpation, since it constitutes dealing in the property. On the other hand, sitting on the spread carpet of another does not constitute usurpation, since the owner is assumed to have spread the carpet, and sitting on it does not negate the owner’s possession.

It is important to add two more restrictions to the definition of usurpation. The first is that usurpation must be made openly, to exclude clandestine taking of property, which constitutes theft. Second, usurpation must be made to include prevention of possession if the property was not in the owner’s possession at the time of usurpation. The latter addition allows the definition to extend to properties usurped while in the possession of a lessee, a creditor as part of pawning, or a depositary. In all such cases, the owner’s possession was not negated, but was prevented by limiting his ability to deal in the property.

- The Mālikīs defined usurpation<sup>7</sup> as taking property through forceful transgression, outside the context of warfare or road-robbery (*ḥirābah*).
  - The taking of property includes usurpation as well as many legitimate activities such as repayment of debts and withdrawals of deposits, etc.
  - The use of the term “property” excludes mere transgression (*al-taʿaddī*), in order to exclude from the definition of usurpation other transgressions on usufruct, such as living in the house of another or riding his animal without his consent.
  - The requirement of taking by force excludes theft from the definition, since theft includes forcefulness after the act of taking property, but not at the time of taking such property. This restriction also excludes properties taken by the owner’s consent, e.g. through a loan or gift.
  - The requirement of injustice in usurpation excludes from the definition properties taken rightfully by force, e.g. to repay the debt of a

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<sup>7</sup> Al-Dardīr ((Mālikī)A, vol.3, pp.442,459).



delinquent debtor, return usurped objects to the rightful owner, or taking the obligatory *zakāh* from one who refuses to pay it voluntarily.

- The final restriction excludes acts of *ḥirābah*, since properties taken by road-robbers or the like have a different status from usurped properties.

Thus, we see that the Mālikīs considered usurpation to be a special case of transgression (*taʿaddī*), since the latter may impact not only properties, but also honor, and lives, the latter requiring punishment by death rather than fines. Moreover, they distinguished for properties usurpation, which is taking the property itself unjustly by force, while taking its usufruct falls within the larger context of transgression but outside the scope of usurpation.<sup>8</sup>

In this regard, the Mālikīs listed four types of transgression against property:<sup>9</sup>

1. Taking the physical object, i.e. usurpation.
  2. Taking the usufruct but not the physical property, in which case the transgressor is required to pay the market rent.
  3. Consuming or destroying the property, e.g. killing an animal, cutting trees, spoiling food, etc.
  4. Causing loss for the owner, e.g. opening a man's store and leaving it open, resulting in theft, leaving a cage open resulting in a bird fleeing, or lighting a fire that destroys property, etc. The transgressor in such cases and similar ones is required to compensate the owner for what he destroyed on purpose or accidentally.
- The Shāfiʿīs and Ḥanbalīs defined usurpation<sup>10</sup> as unjustly and forcefully taking the property or legal rights of another. This definition covers valued properties, usufruct, legal rights such as the right to reclaim land by marking its borders, non-valued properties such as wine, and non properties such as dogs. In contrast, taking the property of an enemy of Islam is not usurpation since it is rightful.

<sup>8</sup>There are other differences between the two concepts. For instance, minor harm caused by the usurper gives the owner only the right to take the value of his usurped property if he wishes. Thus, the usurper who causes minor harm is only responsible for punitive damages (*ʿarsh*) equal to the loss his usurpation caused. Another difference between the two concepts is that a general transgressor does not necessarily guarantee the property against losses caused by natural disaster, while a usurper guarantees usurped property against such losses. Moreover, a general transgressor has to compensate the owner for all lost output (e.g. of a house he closed, or a land he prevented from being cultivated). In contrast, a usurper is only responsible to compensate the owner for the output of the part of the property he used in fact, c.f. Al-Dardīr ((Mālikī)A, vol.3, p.459 onwards).

<sup>9</sup>Ibn Juzayy ((Mālikī), p.331 onwards).

<sup>10</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.275), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.83), Ibn Qudāmah (, vol.5, p.220).



### 116.1.3 Consequences of juristic differences in demarcation

There are two main views regarding the demarcation of usurpation:

1. 'Abū Ḥanīfa and 'Abū Yūsuf defined usurpation as:<sup>11</sup> forcefully and openly preventing the owner of valued property from dealing in or using his property. Thus, two conditions are required for usurpation in their opinion: removing the owner's control over the property, and replacing it with the transgressor's control.<sup>12</sup>
2. Muḥammad, Zufar, and the Mālikīs, Shāfi'īs, and Ḥanbalīs ruled<sup>13</sup> that usurpation is established upon taking control of the property of another without his consent. Thus, they did not require the owner's control to be removed for establishing usurpation. This definition covers not only physically taking the property away, but also preventing the owner from using or dealing in his property, even if it is not moved from its place.

The consequences of this difference in opinion is best illustrated by considering the cases of usurped immovable objects (e.g. real estate), as well as the legal status of growth and usufruct of the usurped property. Moreover, the difference in opinion between the Ḥanafīs and other schools is best illustrated by considering the case of non-valued property usurpation.

#### 1. Usurpation of immovable property

'Abū Ḥanīfa and 'Abū Yūsuf deem it impossible for immovable properties to be usurped. This follows from the fact that they require removal of the owner's control by transporting the usurped property, and thus restrict usurpation to movable properties.<sup>14</sup> Thus, they ruled that if a person usurped real estate, and it was later destroyed in his possession by natural causes (e.g. a flood), the one in possession of the property is not required to compensate the owner, since they do not consider him a usurper. They ruled thus in analogy to the case where a transgressor merely prevents the owner of movable property from using it, whereby if the property is destroyed by natural causes he would not have to compensate the owner. On the other hand, if the one who took control of an immovable property destroyed it by his own actions, then he would be responsible for compensation, not by virtue of usurpation, but by virtue of destruction of the property of another.

<sup>11</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.143), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.368), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.224).

<sup>12</sup> Al-Zayla'ī ((Ḥanafī Jurisprudence), *ibid.*).

<sup>13</sup> Al-Dardīr ((Mālikī)A, vol. 3, p.442), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.275), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.83). The opinion of 'Abū Yūsuf and Muḥammad is the accepted ruling among Ḥanafīs in properties not established as mortmains (*waqf*). As for *waqf*, the Ḥanafīs apply the opinion of Muḥammad and Zufar.

<sup>14</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.45 onwards), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.189), 'Ibn Al-Humām ((Ḥanafī), *ibid.*), Al-Zayla'ī ((Ḥanafī Jurisprudence), *ibid.*).



In contrast, Muḥammad, Zufar, Mālik, Al-Shāfiʿī, and ʿAḥmad all ruled<sup>15</sup> that immovable properties, such as land and homes, can be usurped, and that the usurper thus guarantees such properties. For the non-Ḥanafīs, this ruling follows from the fact that the mere act of exercising control over the property of another (e.g. by dwelling in his house, or putting his furniture therein) implies removal of the owner's full control over the property, since both parties cannot have control simultaneously. Muḥammad and Zufar also recognize that this argument implies the essence of usurpation by removing the owner's control and replacing it with the usurper's. Thus, they make no distinction between movable and immovable properties with regards to the possibility of usurpation.

Those jurists also argued that all properties that are guaranteed against destruction by transgressors must also be guaranteed by usurpers. Moreover, whatever can be subject to guaranty in sales must also be subject to guaranty in usurpation. Thus, since the essence of usurpation, which is using the property of another through transgression, applies to movable and immovable properties alike, they must be treated alike. Moreover, the above-mentioned Ḥadīth: "whoever usurps a square-foot of land will have seven earths-wide collar around his neck"<sup>16</sup> implies that usurpation of land is possible. Thus, this ruling seems to be the most appropriate.

## 2. Growth in usurped property

ʿAbū Ḥanīfa and ʿAbū Yūsuf ruled that increases in usurped property is not guaranteed by the usurper against destruction by natural causes, without the usurper's transgression. Thus, they ruled that the usurper's possession of such growth is a possession of trust.<sup>17</sup> They applied this rule regardless of whether the growth is separate (e.g. offspring, milk, fruits, etc.), or contiguous (e.g. fattening). They based this ruling on their demarcation of usurpation, which requires removal of the owner's control over the usurped property. In this case of growth in the usurper's possession, the owner would never have had control over such growth, and hence the growth itself is not usurped. This is analogous to their reasoning for the impossibility of usurpation of immovable property. On the other hand, they ruled that if the usurper transgresses against the increase, by destroying it, consuming it, selling it, or refusing to give it to the owner upon his request, then he would thus become a usurper and his possession of the growth becomes a possession of guaranty by virtue of that transgression and prevention of the owner from exercising control over his property.

The majority of Mālikīs ruled<sup>18</sup> that the usurper does not guarantee naturally occurring contiguous growth (e.g. fattening or increase in size). On the

<sup>15</sup> Al-Dardīr ((Mālikī)A, vol.3, p.443), ʿIbn Ruṣḥd Al-Ḥafīd ((Mālikī), vol.2, p.311), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.275 onwards), ʿIbn Qudāmah (, vol.5, p.223), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.83 onwards).

<sup>16</sup> Narrated by ʿAḥmad, Al-Bukhārī, and Muslim on the authority of ʿĀʾisha (mAbpwh).

<sup>17</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.143,160), ʿIbn ʿĀbidīn ((Ḥanafī), vol.5, p.143), ʿIbn Al-Humām ((Ḥanafī), vol.7, p.388), ʿAbd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.2, p.194).

<sup>18</sup> ʿIbn Ruṣḥd Al-Ḥafīd ((Mālikī), vol.2, p.313), Al-Dardīr ((Mālikī)B, vol.3, p.596), Al-Dardīr ((Mālikī)A, vol.3, p.448), *Sharḥ Al-Risālah* by ʿAbū Zayd Al-Qayruwānī (vol.2, p.220).



other hand, separate growth (e.g. milk, fruits, wool) are guaranteed by the usurper against consumption and destruction, even if the growth did not result from the usurper's actions. Thus, the usurper is required to return all such growth, together with the original usurped property, to the property's owner.

Muḥammad, the Shāfi'is, and the Ḥanbalīs ruled<sup>19</sup> that all increases (contiguous and separate) that occur while the usurper is in possession of the usurped property are thus guaranteed by the usurper against any destruction or diminution. They based their ruling on the view that the usurper's forbidden transgressing possession of the usurped property is the cause for his possession of its growth, and thus the guaranty of the first possession extends to the second.

### 3. Usufruct and output of usurped property

The Ḥanafīs ruled<sup>20</sup> that a usurper need not compensate the property's owner for that property's usufruct that he extracted or prevented the owner from extracting. This ruling follows from their principle that usufruct does not qualify as a property. Moreover, they reasoned, the usufruct that occurred while the property was in the usurper's possession was non-existent when the owner possessed the property, thus the usufruct is not considered usurped in their school, since the owner's possession of such usufruct was not negated by the usurper.

However, later Ḥanafī jurists enumerated three exceptions to this rule, whereby the usurper must compensate the owner for the market rent of his usurped property: (i) if the usurped property was established as a mortmain, (ii) if the owner was an orphan, or (iii) if the property was bought or built for the purpose of leasing.

The Ḥanafīs also ruled, on the other hand, that if the physical property itself is diminished by the usurper's usage, then he must compensate the owner for the diminution in value. As for the output of a usurped property, 'Abū Ḥanīfa and Muḥammad ruled that the usurper is not entitled to that output, since it constitutes benefiting from the property of another. In contrast, 'Abū Yūsuf and Zufar ruled that it is legitimate for the usurper to take the usurped property's output.

The majority of Mālikīs ruled<sup>21</sup> that a usurper must compensate the owner for the output of usurped physical property if he used it, whether the property is movable or immovable. On the other hand, they ruled that the usurper does not need to compensate the owner for output that did not result from his own usage, even if the usurpation prevented the owner from using the physical property.

In contrast, they ruled that if the usurper merely usurped usufruct of the owner's property (which they call transgression, more generally), he must pay the market rent for usufruct that he used or prevented the owner from utilizing.

<sup>19</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.145), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.144-5), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.294), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.195), 'Abū 'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.370), 'Ibn Qudāmah (, vol.5, p.399 onwards).

<sup>20</sup> Al-Dardīr ((Mālikī)A, vol.3, p.448), Al-Dardīr ((Mālikī)B, vol.3, p.595 onwards), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.315), *Sharḥ Al-Risālah* (vol.2, p.240).

<sup>21</sup> Al-Dardīr ((Mālikī)A, vol.3, p.448), Al-Dardīr ((Mālikī)B, vol.3, p.595 onwards), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.315), *Sharḥ Al-Risālah* (vol.2, p.240).



The Shāfi'is and Ḥanbalis ruled<sup>22</sup> that a usurper guarantees the usufruct of usurped property, and thus must compensate the owner for its market rent, whether he extracted the usufruct or merely spoiled it for the owner, and whether the property was movable or immovable. They based this ruling on their classification of usufruct as valued property, which thus must be guaranteed in analogy to guaranty of the usurped physical property itself. This ruling seems to be closest to justice, and most in agreement with today's materialistic leaning which enforces the assessment of values of all things, including intellectual property rights.

#### 4. Usurpation of non-valued properties

The Ḥanafis ruled<sup>23</sup> that a usurper does not compensate the owner for non-valued property (e.g. wine or pork) that he had usurped if it perished in his possession, or if he consumed it (including if he turned usurped wine into vinegar), regardless of whether the usurper is Muslim, Christian, or Jewish. This ruling follows from the fact that wine or pork are not a valued property for a Muslim, and thus should be thrown away. On the other hand, if the usurper took wine from a Muslim, turned it into vinegar, and then consumed it, then he should compensate the owner with vinegar (and not wine). In the latter case, the usurpation of the wine itself does not require compensation, but when the wine became vinegar, its owner was deemed to be the original owner of the wine, and hence by consuming that owner's vinegar, the usurper is required to compensate him for it. The same complicated ruling applies to usurped skin of a dead animal that is died by the usurper and then consumed thus, in which case, he must compensate the owner for the value-added induced by dying it.

On the other hand, if the owner of usurped wine or pork was a Christian or a Jew, then the usurper (Muslim, Christian, or Jewish) must compensate the owner if he consumed his usurped property. This ruling follows from the fact that such properties are permissible for the non-Muslims, and Muslims were ordered to respect Christians and Jews and their religious practices, thus allowing them to trade in such properties.<sup>24</sup> However, if the usurper was a Muslim, then he should compensate the owner with the value of usurped wine, since he is forbidden from owning wine. If the usurper was a non-Muslim, then he may compensate the owner with wine, since he may own it and deal in it.

In contrast, non-properties such as dead animals and blood are not guaranteed by usurpation, even if it belonged by a Christian or Jew, since no religion

<sup>22</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.486), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.367), *Faṭh Al-ʿAzīz* (vol.11, p.262), 'Ibn Qudāmah (, vol.5, p.270), 'Ibn Rajab (1st edition (Ḥanbalī), p.213).

<sup>23</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.147 onwards, 162 onwards), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, pp.147-9), 'Ibn Al-Humām ((Ḥanafī), vol.7, pp.396-405), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.195), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.222).

<sup>24</sup>Narrated on the authority of ʿAlī ibn 'Abī Ṭālib (mAbpwh) that as long as Christians and Jews pay the *jizyah*, their blood and their properties become protected the same as the blood and property of a Muslim, and that Muslims were ordered to allow them to practice their religion as they see fit, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.369), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.398).



recognizes such objects as property. Similarly, if the owner of a property purposefully makes it public, then its usurper does not guarantee it upon usurpation.

On the other hand, if a Muslim usurps a cross from its Christian owner, then he must compensate the owner if the cross perished in his possession.

'Abū Ḥanīfa further ruled that whoever destroys a Muslim's musical instruments must compensate him for them. He based this ruling on the view that such properties have other legitimate uses, even if they are commonly used in impermissible activities. In this case, the owner of musical instruments should be compensated for the value of its raw materials. In contrast, 'Abū Yūsuf and Muḥammad ruled that musical instruments are not guaranteed thus, since they considered them mere instruments of disobeying Allāh. Thus, they reasoned in analogy to wine that such properties are non-valued, and should be destroyed. Thus, the destroyer of such instruments is deemed to simply perform a legal duty, as if commissioned by the ruler, and thus should not compensate the owner.

The Mālikīs ruled<sup>25</sup> similarly that wine, pork, musical instruments, idols, and other non-valued properties are not guaranteed if usurped from a Muslim. They based this ruling on the Ḥadīth: "Allāh (swt) and his Messenger have forbidden the sale of wine, dead animals, pigs, and idols".<sup>26</sup> Moreover, they reasoned, such properties require no compensation, they are non-valued.

On the other hand, they ruled that a usurper must compensate a Christian or Jew for wine they owned, since such objects are considered properties for them. Moreover, the Mālikīs ruled that if wine was usurped from a Muslim and then became vinegar, then the owner is given the option of receiving compensation in equal amounts of vinegar or juice. If the amount is not known, then he should be compensated for its value. If the owner of the wine was not Muslim, then the majority of Mālikīs ruled that he is given the option of taking the vinegar, or receiving the wine's value on the day it was usurped.

Finally, they ruled that if the leather of a dead animal (dyed or otherwise), or a dog that may be owned (e.g. for hunting or security) are usurped and destroyed by the usurper, the usurper must thus compensate the owner for the property's value.

This ruling applies despite the prohibition on sales of such properties.

The Shāfi'īs and Ḥanbalīs ruled<sup>27</sup> ruled that owners of usurped wine or pork should not be compensated, regardless of the religion of the owner and the usurper. They ruled thus based on the fact that such properties are perpetually value-less, in analogy to dead animals and impure objects. Moreover, they reasoned that objects such as those are forbidden to use, and thus their

<sup>25</sup> Al-Dardīr ((Mālikī)A, vol.2, p.204; vol.3, p.447), Al-Dardīr ((Mālikī)B, vol.3, p.592 onwards).

<sup>26</sup> Narrated by Al-Bukhārī and Muslim on the authority of Jābir, who said he heard it on the day of conquest of Makkah.

<sup>27</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.285-291), *Fath Al-ʿAzīz Sharḥ Al-Wajīz* (vol.11, p.258), 'Ibn Qudāmāh (, vol.5, pp.256,276), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.374), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.84 onwards), Al-Sha'arānī ((Shāfi'ī), vol.2, p.90).



owner should not be compensated for them. They thus based the ruling on the Prophet's (pbuh) prohibition of selling such properties and order to waste them. In this regard, the general rule is that objects that are impermissible for sale or ownership do not merit compensation.

They ruled similarly that no compensation is required for destroying usurped idols or musical instruments. However, the Shāfi'īs agreed with the ruling of 'Abū Ḥanīfa that the owners of such usurped objects may be compensated for the raw materials if they can have a permissible usage. Otherwise, they ruled that the property would be without value, and no compensation would be required.

On the other hand, they ruled that if a usurper kept the wine of a Christian or Jew, then he must return it to the owner, since the latter is allowed to drink it. On the other hand, if the owner was Muslim, the Ḥanbalīs ruled that the usurper should spill the wine rather than return it to its owner. They based this ruling on the fact that the Muslim usurper is forbidden from possessing the wine, and forbidden from returning it to its Muslim owner (unless the latter is a vinegar-maker) lest he would be assisting him in disobeying Allāh. In this regard, the Shāfi'īs ruled that if wine was usurped from a Muslim, but the latter had not intended to make an intoxicant (e.g. was making vinegar), then it must be returned to him. Otherwise, forbidden wine should be spilled.

Most of the Shāfi'īs ruled that if the usurped property was juice, which turned into wine and then into vinegar in the usurper's possession, then the owner is entitled to the vinegar and financial compensation of the difference between the higher value of juice and the lower value of vinegar. They based this ruling on the fact that the value of the usurped property diminished in the usurper's possession, and thus he was responsible for causing it. In contrast, the Ḥanbalīs ruled that the usurper in this case should compensate the owner with an equivalent amount and quality of the juice he had usurped.

The majority of Shāfi'īs ruled similarly in the case of usurped skin of a dead animal that was dyed by the usurper. Thus, they ruled by analogy to wine that turned into vinegar that if the property were later to perish in the usurper's possession, he would have to compensate the owner. In contrast, the Ḥanbalīs ruled that the skin of dead animals remains impure, even after dying, and thus remains without value and ineligible for sale, and the usurper is not required to return it to the owner.

## 116.2 Legal status rulings

There are three main legal status rulings pertaining to usurpation:<sup>28</sup>

1. The usurper who knows that what he usurped is owned by another is sinful.
2. The usurped object must be returned to its owner if possible.

<sup>28</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.126), 'Ibn Juzayy ((Mālikī), p.330), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.277), 'Ibn Qudāmah (, vol.5, p.259 onwards).



3. If the usurped object perished, then the usurper must compensate the owner.

### 116.2.1 Sinfulness

If the usurper knows that a property belongs to another, and usurps it nonetheless, he would thus transgress religious law and earn a sin for which he is accountable.<sup>29</sup> Proof for this prohibition of usurpation is provided by the Ḥadīth: “Whoever usurps a square-foot of land will be raised on the day of judgment with a collar seven-earths-wide”.

The Ḥanafīs, Mālikīs and Shāfi‘īs ruled<sup>30</sup> that a discerning usurper should be disciplined with corporal punishment and incarceration, irrespective of age. This punishment corresponds to the right of Allāh, and thus is required even if the owner of the usurped property were to forgive the usurper. Thus, the ruler should use his own judgment as to the best means of punishment needed to reform the usurper and serve as a deterrent to future usurpers. On the other hand, the Ḥanafīs and Mālikīs ruled that non-discerning children and insane individuals are not to be disciplined physically for usurpation.

On the other hand, there is no sin or accountability for an individual who usurped property by mistake, e.g. thinking that it was his. Proof for this principle of unaccountability for errors is established by the verse: “Lord, condemn us not if we forget or err” [2:286], and the Ḥadīth: “My nation has been forgiven mistakes, forgetfulness, and whatever they are coerced to do”.<sup>31</sup> However, religious and legal unaccountability in this case does not overrule the requirements of returning the property if it persists, and compensating the owner for it if it perished.

### 116.2.2 Returning usurped properties

Jurists discussed a number of aspects of returning usurped properties. Those include (i) the requirement of returning the property, (ii) the conditions for returning it, where it should be returned, and who bears the cost of returning it, and (iii) how to determine if the property has been returned to its owner.<sup>32</sup>

Jurists are in agreement that if a usurped property is intact, then the usurper is required to return it to its owner. This ruling follows from the Ḥadīth: “Every hand is responsible for what it took, until it returns it. Let not any of you take

<sup>29</sup>There are ten forms of devouring property wrongfully, and they are all forbidden, but with varying legal status rulings. Those ten forms are: (i) road-robbery (*hirābah*), (ii) usurpation, (iii) theft, (iv) embezzlement, (v) breach of trust, (vi) debasement, (vii) denying a valid claim or making an invalid one, (viii) gambling, (ix) paying or receiving bribes, and (x) deception in sales, c.f. ‘Ibn Juzayy ((Mālikī), p.329). In this regard, forbidden property (*ḥarām*) is forbidden to accept, eat from, dwell in, or utilize otherwise. However, receiving compensation from usurped property is a separate requirement, and thus applies even to forbidden properties.

<sup>30</sup>Al-Dardīr ((Mālikī)A, vol.3, p.442), ‘Ibn Juzayy ((Mālikī), p.330), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.4, p.277).

<sup>31</sup>Narrated by ‘ibn Mājāh and Al-Bayhaqī, as well as others, on the authority of ‘ibn ‘Abbās.

<sup>32</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.148), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.128), ‘Ibn Al-Humām ((Ḥanafī), vol.7, p.367), Al-Sha‘arānī ((Shāfi‘ī), vol.2, p.88).



the property of his brother seriously or jokingly. Even if one of you takes the stick of his brother, he must return it”.<sup>33</sup>

In this regard, the usurped property should be returned to the location where it was usurped, since a property’s value depends on the location. The usurper should bear the cost of returning the property thus, since it is an integral part of the required return, in analogy to the requirement in returning borrowed property.

The property is considered returned to its owner as soon as the latter has control and possession over it. Thus, removal of the usurper’s control and possession, and restoring them to the owner, reverses the process of usurpation and results in the property being returned (unless, of course, it is usurped once again).

Once the property is returned, the usurper is absolved from his responsibility to compensate the owner for any losses, whether or not the owner knows that the property was returned to him. This ruling follows from the fact that returning property is a physical act, the occurrence of which does not require knowledge thereof.

### 116.2.3 Compensation for perished usurped properties

#### 1. Methods of compensation

The Ḥanafīs ruled that the usurper must compensate the owner of a usurped movable property if it perished in his possession, due to his own actions or natural causes.<sup>34</sup> The non-Ḥanafīs extended this requirement to compensate the owner to usurped immovable properties.<sup>35</sup> If the destruction of property was caused by a third party, not by natural causes, then the usurper may in turn seek compensation from the responsible party. This ruling follows from the fact that prior to the property’s destruction, the usurper could have been absolved of its guaranty by returning it to the owner. Thus, the jurists said: “A usurper guarantees what he usurped, whether it is destroyed by natural causes, or through the actions of a creature”.<sup>36</sup>

In this regard, jurists agree that compensation should be in kind for fungible properties, and in value for non-fungibles. In cases of destroyed fungible properties the likes of which could not be found, necessity dictates that the usurper should also compensate the owner for their value.

<sup>33</sup>Narrated by ‘Aḥmad, ‘Abū Dāwūd, and Al-Tirmidhī on the authority of Al-Sā’ib ibn Yazīd and his father, c.f. Al-Shawkānī (, vol.5, p.316).

<sup>34</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.50), Al-Kāsānī ((Ḥanafī), vol.7, pp.150,168), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.128), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, pp.223-4), ‘Ibn Al-Humām ((Ḥanafī), vol.7, p.363), ‘Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.4, p.188 onwards).

<sup>35</sup>Al-Dardīr ((Mālikī)A, vol.3, p.443), ‘Ibn Juzayy ((Mālikī), p.330 onwards), ‘Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.312), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, pp.281,284), *Fath Al-‘Azīz Sharḥ Al-Wajīz* (vol.11, p.242; in Al-‘Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī))), ‘Ibn Qudāmāh (, vol.5, pp.221,254,258), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.116 onwards).

<sup>36</sup>‘Ibn Juzayy ((Mālikī), p.331).



Compensation in kind is legalized by the verses: “Punish whoever transgresses against you in the same manner of their transgression” [2:194], “If you punish, then punish in the same manner that you were harmed” [16:126], “The punishment for an injury caused is an equal injury” [42:40].

Moreover, compensation in kind is closer to returning the usurped property, in the sense of compensation with the most similar property. Such compensations are therefore most conducive to correcting the wrong that was done. On the other hand, compensation for the value is legalized when compensation in kind is not possible. Thus, the value of property becomes the closest approximation to its kind.

In this regard, we recall that fungible properties are those deemed homogeneous, readily available, and measured by weight, volume, count, or size. In contrast, non-fungibles are those the likes of which are not readily available, and each unit of which is unique in value.<sup>37</sup>

Thus, compensation for value is required in three cases:<sup>38</sup>

1. If the usurped property was non-fungible (e.g. a house or an animal).
2. If the property was a mixture of two genera (e.g. wheat mixed with barley).
3. If the property was fungible, but could not be found in the market, if it could only be found at a cost exceeding the market price of what was usurped, or if the usurper was not allowed to possess the genus (e.g. wine).

## 2. Time of guaranty and compensation assessment

Jurists expressed somewhat similar opinions regarding the timing of establishment of guaranty of usurped properties, and timing of the assessed compensation. In this regard, the Mālikīs and the majority of Ḥanafīs ruled<sup>39</sup> that the value of usurped property should be assessed for the day of its usurpation, irrespective of subsequent changes in price. This ruling follows from the view that the instigating factor for guaranty and its object do not change from the usurpation time forward. However, the Mālikīs distinguished between guaranty of the usurped physical property, and guaranty of its output. Thus, they ruled that

<sup>37</sup> Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.130; vol.4, p.173), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.188), Ibn Al-Humām ((Ḥanafī), vol.7, p.363), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.223), Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.312), *Sharḥ Al-Risālah* (vol.2, p.217), Ibn Juzayy ((Mālikī), p.330), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, pp.281, 284), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.116 onwards), *Al-Mudkhal* by Professor Al-Zarqāʾ (p.50).

<sup>38</sup> Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.129).

<sup>39</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.151), Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.128), Ibn Al-Humām ((Ḥanafī), vol.7, p.363), Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.50), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.223), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.188), Al-Dardīr ((Mālikī)A, vol.3, pp.443,448), Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.312), Ibn Juzayy ((Mālikī), p.330). This is the chosen opinion of ʿAbū Yūsuf, which was codified in *Al-Majalla* (item #921). In this regard, ʿAbū Ḥanīfa ruled that compensation is assessed for the disputation date, while Muḥammad ruled that it should be assessed for the date the property’s equal became unavailable in the market.



the property itself is guaranteed on the day of its usurpation, while the output is guaranteed on the day it is used by the usurper. Moreover, they ruled that transgressors who usurp usufruct must guarantee the usufruct at the time the property's owner could not extract it, whether or not the transgressor utilized the physical property.

The Shāfi'is ruled<sup>40</sup> that guaranty should be assessed at the maximal level reached from the time of usurpation in its location until the time of the property's destruction or seeking its equal for compensation. They ruled thus, whether changes in value arise from changes in prices, or changes in the property itself. The same rule applies for non-fungibles, which are guaranteed for the maximal value from the time of usurpation to the time of property destruction.

The Ḥanbalīs ruled<sup>41</sup> that the compensation value for a usurped fungible the equal of which could not be found must be assessed at its value on the day its equal stopped being available. They based this ruling on the view that compensation had to be in kind, until the time an equal could not be found, thus value would be assessed at that time.

The Ḥanbalīs further ruled for non-fungible usurped properties that compensation is assessed at the maximal property-value from the time of usurpation to the time of compensation, provided that changes in value were caused by changes in the property itself (e.g. growth) rather than price fluctuations. If the value changed due to an increase in prices, the usurper is not responsible for the increase. The latter ruling follows from the fact that if the property was intact, it would have to be returned regardless of changes in market value without adjustment for price fluctuations.

### 3. Absolution of usurper guaranty

The usurper can be absolved of guaranteeing the usurped property in one of four ways:<sup>42</sup>

1. Returning the usurped property intact and unattached to any other.
2. Compensating the owner or his agent.
3. Explicit absolution (*'ibrā'*) by the owner of the usurped property, or specifying one of many usurpers as the guarantor thus implicitly absolving the others.
4. Feeding the owner or his animals usurped food, knowing that it is his food that he or his animal ate. Alternatively, if the owner gave the usurped property to the usurper as a deposit, gift, loan, lease, or to work on it, with

<sup>40</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.283; vol.3, p.136), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.368), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.3, p.136), Al-Ramlī ((Shāfi'ī), vol.4, pp.119-121).

<sup>41</sup> Ibn Qudāmah (, vol.5, p.257 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.117).

<sup>42</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.151), Al-Dardīr ((Mālikī)B, vol.3, p.600 onwards), *Al-Sirāj Al-Wahhāj Sharḥ Al-Minhāj* (p.268), Ibn Qudāmah (, vol.5, p.437), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.103).



knowledge that this is the owner's property, the usurper's possession would change and thus his own characterization would change from usurper to depositary, recipient, borrower, lessee, etc.

### Usurper entitlement after compensation?

In this regard, one might wonder if the usurper owns the usurped property after compensating the original owner. We now review the jurists' views on this issue:

- The Ḥanafīs ruled<sup>43</sup> that upon compensating the original owner, the usurper is considered to be the property's owner retroactively from the time of usurpation. They ruled thus to avoid assigning ownership of the property and its compensation simultaneously to the original owner. Thus, if the usurper had sold, or given the usurped property away as a gift or charity prior to compensating the owner, his actions would be executed based on this retroactive assignment of ownership. This ruling is analogous to the dealings of a buyer in a defective sale. Thus, if the usurper takes a property away from its owner, and the owner seeks compensation for the property's value, the usurper would thus automatically become the property's owner, to avoid making a single person owner of the property and its compensation.
- 'Abū Ḥanīfa and Muḥammad ruled in this regard that the usurper is not allowed to use the usurped property (e.g. by eating it or feeding it to another) prior to paying compensation. Moreover, they ruled by juristic approbation that any increase or growth in the property, or output thereof, is deemed unlawful for him should be given away in charity.<sup>44</sup> They based their ruling on the fact that the Prophet (pbuh) did not allow usage of usurped property before making the original owner whole. This Ḥadīth was narrated by 'Abū Ḥanīfa on the authority of 'Abū Mūsā Al-'Ash'arī (mAbpwh) that the Prophet (pbuh) was hosted by some of the 'Anṣār, when they offered him a roasted sheep. He (pbuh) took a bite, and did not like it. Then he (pbuh) said: "This sheep tells me that it was slaughtered unlawfully". They said: "It belongs to our neighbor, and we thought we'd slaughter it now and pay him its price later". Thus, the Prophet (pbuh) said: "Then, feed it to the war prisoners".<sup>45</sup> Thus, he (pbuh) forbade them from eating or giving it to him despite their need. Were it lawful for them to use the sheep as they saw fit, he (pbuh) would not have restricted them thus.

<sup>43</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.16, p.15), Al-Kāsānī ((Ḥanafī), vol.7, p.152 onwards), 'Abd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.2, p.193).

<sup>44</sup>'Abū Yūsuf and Zufar ruled that the usurper is allowed to benefit from the property, and is not required to give increases in charity. They based this ruling on the view that usurper-ownership of the property is established retroactively from the time of usurpation. Thus all growth and output of the usurped property would become lawfully owned by the usurper.

<sup>45</sup>Narrated by Muḥammad ibn Al-Ḥasan in *Kitāb Al-'Āthār*, and also narrated by 'Abū Dāwūd, 'Aḥmad, and Al-Dāraqūṭnī, on the authority of 'Āṣim ibn Kulayb, on the authority of his father, on the authority of a man of the 'Anṣār, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.168).



- The Mālikīs ruled<sup>46</sup> that a usurper is not allowed to pawn usurped property or use it in a guaranty contract, to avoid wasting the owner's right. Similarly, if anyone receives usurped property as a gift, cannot accept it and use it (e.g. eat it or live in it), in analogy to all *ḥarām* properties. However, if the usurped property was adversely effected in the usurper's possession, then most Mālikīs ruled that he may thus utilize it, since it would thus be established that he has to compensate the owner for its value. Thus, some jurists have ruled that it is permissible to buy the meat of usurped sheep after it was sold to butchers and slaughtered. This ruling follows from the view that the act of slaughtering made the usurpers responsible for compensation in value, and makes him retroactively the property's owner from the time of usurpation. However, those same jurists stated that it is better from the view of religion and honor to avoid such meat.
- The Shāfi'īs and Ḥanbalīs ruled<sup>47</sup> that a usurper does not own the usurped property by virtue of paying its value to the owner. They based this ruling on the view that he could not buy it after it became defective, since it cannot be delivered whole, and hence cannot own it by paying its value either. Thus, they ruled in analogy to the ruling of impossibility of owning a defective item by virtue of causing its defect.

Consequently, they forbade and invalidated all dealings of the usurper in the usurped property, with or without a contract.<sup>48</sup> They based this ruling on the Ḥadīth: "Whoever acts in a way that we (Muslims) do not act has this action rejected".<sup>49</sup> Thus, sales and leases of usurped property are not permitted, and usage or consumption of such properties are not permitted either, based on the Ḥadīth: "Your properties and your blood are sacred among you".

#### 4. Changes in usurped property

The Ḥanafīs distinguished between four cases, depending on whether changes in a usurped property that continues to exist were caused by the usurper or independently, and whether the change pertains to characteristics or the name and identity of the property:<sup>50</sup>

<sup>46</sup> Al-Dardīr ((Mālikī)A, vol.3, p.445 onwards), Al-Dardīr ((Mālikī)B, vol.3, p.586).

<sup>47</sup> 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.368), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.277,279), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, pp.120, 123 onwards), 'Ibn Qudāmah (, vol.5, pp.251-3).

<sup>48</sup> The Ḥanbalīs further ruled in disagreement with other jurists that performing pilgrimage or other acts of worship using usurped property is invalid and forbidden, while other property-utilizing acts of worship (e.g. prayer with usurped clothes, paying *zakāh* from usurped property, etc.) that do not utilize the usurped property (e.g. fasting) are not invalidated, c.f. Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.123 onwards), *'Uṣūl Al-Fiqh* by Dr. Al-Zuhaylī (vol.1, p.82).

<sup>49</sup> Narrated by Muslim on the authority of 'Ā'isha (mAbpwh).

<sup>50</sup> 'Ibn Al-Humām ((Ḥanafī), vol.7, pp.375,384), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, pp.191,193), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, pp.226,229), 'Ibn 'Ābidīn



1. Independent changes in the usurped property (e.g. drying of grapes or dates) establishes an option to the owner either to be compensated with the usurped property itself, or compensated for its value by the usurper.
2. If the usurper caused a change in the usurped property (e.g. dying a dress) or if the usurped property was mixed with the usurper's property in a manner that does not allow separation, then the owner is also given an option. In this case, the owner is allowed either to demand compensation from the usurper for the value of his usurped property prior to usurpation, or to take the changed or mixed property and compensate the usurper for the value of increase, to ensure equity on both sides.

The Mālikīs agree with the Ḥanafī ruling in this case.<sup>51</sup>

The majority of Shāfi'īs ruled<sup>52</sup> in this case that if the increase can be separated from the usurped property (including removal of dye from a dress), the usurper is required to separate it. If separation is not possible, then the ruling depends on changes in the value of the usurped property. Thus, if the property's value did not increase, the usurper is not entitled to any portion or compensation thereof. If the property's value was diminished, the usurper is thus responsible to compensate the owner for that diminution. Finally, if the property's value increased, that increase is distributed: two-thirds to the owner, and one-third to the usurper. In all of the above, market prices are used to determine changes in value.

The Ḥanbalī rulings in this case generally agree with their Shāfi'ī counterparts.<sup>53</sup> However, they ruled in the case of a usurped dress that was dyed by the usurper that the usurper should not be forced to remove the dye, since the latter was his property, and he would thus have to destroy it. They also ruled that the usurper should compensate the owner for any diminution in value caused by his action. Finally, they ruled in the case of increase in value due to mixture with the usurper's property that the owner and usurper are deemed partners in proportion to their properties. Thus, the property should be sold, and its price should be distributed according to that ratio.

3. The Ḥanafīs and Mālikīs ruled that if the property itself and its nature are changed by the usurpers actions, thus changing its intended usufruct (e.g. usurped sheep slaughtered and cooked by the usurper, etc.), then ownership is transferred to the usurper, who thus must compensate the owner (in-kind for fungibles, and by value for non-fungibles). In this case, they ruled by juristic approbation that the usurper should only utilize the usurped property after compensating its owner or getting his absolution of guaranty, to avoid creating disputes and animosity.

((Ḥanafī), vol.5, pp.134-8), Al-Kāsānī ((Ḥanafī), vol.7, p.160 onwards).

<sup>51</sup>Al-Dardīr ((Mālikī)A, vol.3, p.454).

<sup>52</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.291).

<sup>53</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, pp.86,103), 'Ibn Qudāmah (, vol.5, p.266 onwards).



In this case, the Shāfi'is ruled<sup>54</sup> that the original owner's right is not terminated in this case. Thus, they allowed the owner to take his altered property, together with compensation for any diminution in value. The majority of Ḥanbalīs further ruled that if the property's value increased in this case, he would not be entitled for any compensation from the owner.

'Abū Ḥanīfa's ruling<sup>55</sup> for usurped gold and silver used in minting coins or making pots agreed with the Shāfi'ī and Ḥanbalī rulings just reviewed. Thus, the owner would still be entitled to take back his property, and the usurper is not entitled to compensation for increases in value. He based this ruling on the view that the usurped physical property in fact continues to exist in essence and name, thus retaining the four legal status rulings pertaining to gold and silver (serving as monetary numeraires, measurement by weight, susceptibility for *ribā*, and requirement of paying *zakāh*). Thus, the owner's right remains attached to the usurped and altered gold or silver.

In contrast, 'Abū Yūsuf and Muḥammad ruled for gold and silver in the same manner they ruled for other usurped and substantially altered properties.<sup>56</sup> Thus, they ruled that ownership would be transferred to the usurper, who is consequently required to compensate the owner in-kind. They based this ruling on the view that the alterations described in the example (minting coins or making pots) are recognizable manufacturing alternations of the property. Thus, the legal status should be determined by analogy to the case of perished usurped property. They also disagreed with 'Abū Ḥanīfa's claim that the property remains the same in essence and name, since the prior name of "gold" is different from the subsequent name of "Dinār" (gold-coin) or "pot".

## 5. Diminution in usurped property

A usurped property may be diminished in the usurper's possession either materially, or in value. In this regard, the Ḥanafīs considered four types of diminution in usurped property:<sup>57</sup>

1. Diminution in value may be caused by a fall in the property's market price. The owner is clearly not compensated for this type of diminution in value if the physical property is returned to him. This ruling follows from the fact that diminution in this case was not caused by a physical diminution in the property, but merely by a reduction in market demand,

<sup>54</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.369), 'Ibn Qudāmah (, vol.5, p.243).

<sup>55</sup>'Ibn Al-Humām ((Ḥanafī), vol.7, p.379), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.192).

<sup>56</sup>In this regard, *Al-Majallah* (item #899) applies this ruling to all properties, hence agreeing with the opinion of 'Abū Yūsuf and Muḥammad.

<sup>57</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.155), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.382), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.288 onwards), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.190), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.132).



the causer of which is Allāh (swt), and which cannot be controlled by any one individual.

2. Diminution in value may result from a change in the property's characteristics (e.g. if a usurped animal becomes weaker, loses sight, etc.). In this case, the owner should take back the property that continues to exist, and the usurper must compensate the owner for diminution in value if the usurped property was not susceptible for *ribā*.

However, if the usurped property was eligible to *ribā* (e.g. wheat that rotted, or a silver pot that was broken), then the owner is only entitled to taking back the usurped property without any compensation for diminution. This ruling follows from the fact that returning the physical property with an increase to compensate for diminution in value would be a form of forbidden *ribā*.

3. Diminution may be caused by loss of desirable characteristics (e.g. youth giving way to old age, escape of a usurped animal, or loss of a skill). In all such cases, the usurper is required to compensate the owner for the diminution in value.
4. Diminution may be a physical loss of part of the property, in which case the usurper must compensate the owner for the loss if the property continues to exist.

However, if the physical loss in the property is major (e.g. a dress that has a major cut), rendering the property useless, then the buyer is given an option of taking it back and seeking compensation for the defect, or leaving it and demanding compensation for its value. The latter option is given since the property may be deemed destroyed. In this regard, the demarcation between minor and major losses is determined thus:

- Minor losses do not negate any uses of the property, but merely reduce the amount of usufruct.
- Major losses pertain to part of the physical property and some of its usufruct, whereby what remains is the other part of the property and corresponding part of the usufruct.

In this regard, *Al-Majallah* (item #900) stated that any losses of one-quarter of a usurped property or more are considered major, and anything less is considered minor.

If compensation for diminution in value is required, it is assessed by comparing the value of the undiminished property on the day of its usurpation, and its value after diminution.

In the case of usurped immovable properties, we have seen that the Ḥanafīs do not require the usurper to compensate the owner for diminution or destruction due to natural causes. On the other hand, we have also seen that the usurper must compensate the owner for diminution caused by the



usurper's actions or utilization of the usurped property, since diminution in this case is caused by his transgression.

The majority of non-Ḥanafīs ruled<sup>58</sup> in agreement with the Ḥanafīs that the usurper is not responsible for changes in the property's value due to price fluctuations. They based this ruling on the view that the physical property and its characteristics would not have changed in this case, but merely its desirability in the market place, for which there is no compensation.<sup>59</sup> In contrast, the Shāfi'īs and 'Abū Thawr ruled that a usurper must compensate the owner for changes in value caused by price changes.

The majority of non-Ḥanafīs also ruled that the usurper must compensate the owner for any diminution in the physical property or its characteristics, whether the diminution was caused by the usurper's actions or natural causes. In contrast, the majority of Mālikīs ruled that the owner is entitled to an option of taking back his diminished property if the diminution resulted from natural causes, or compensation for the property's value on the day of usurpation. However, they did not allow the owner to take back the diminished property together with a separate compensation for the diminution in value. However, if the property was diminished by the usurper's transgression, then the owner is given the option of taking compensation for the property's value on the day of usurpation, or taking the diminished property together with a compensation for its diminution. The later change in value is assessed by 'Ibn Al-Qāsim on the day of transgression, and by Saḥnūn on the day of usurpation. On the other hand, 'Ashhab did not distinguish in his rulings between diminution caused by natural causes and that caused by usurper transgression.

## 6. Increase in usurped property

We have already reported the ruling of 'Abū Ḥanīfa and 'Abū Yūsuf that a usurper need not give the owner any compensation for contiguous or separate growth in the usurped property. They based this ruling on the view that the property's owner never had control over that growth, and hence the instigating factor for compensation (removal of his control) does not apply. In contrast, we have seen that Muḥammad, the Shāfi'īs and the Ḥanbalīs ruled that all increases in usurped property are guaranteed for the owner by the usurper, and that the Mālikīs ruled that the usurper is only required to compensate the owner for separate growth. In what follows, we shall list some of the examples of growth in usurped property studied in some detail.

<sup>58</sup>'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.312 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.452), 'Ibn Juzayy ((Mālikī), p.331), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.286,288), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.369), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.99 onwards), 'Ibn Qudāmah (, vol.5, pp.228,232,241).

<sup>59</sup>Price changes are not considered in usurpation of physical properties. In contrast, the Mālikīs ruled that the owner is entitled to demand compensation for the property's value on the day of usurpation in transgression through usurpation of usufruct. On the other hand, they also allow the owner in this case to take his property back, with no compensation for price changes required from the transgressor.



### Building, planting trees, or farming usurped land

The jurists of all four schools agreed in principle that the usurper must return usurped land to its owner. They also ruled that he must remove any additions (buildings, plants, or trees) added to the property. This ruling is based on the Ḥadīth: “The labor of a transgressor earns him no rights”.<sup>60</sup> In what follows, we review the specific rulings in each school:

- The Ḥanafis ruled<sup>61</sup> that if a person usurped a large wooden beam and built around it a building of higher value than the original beam, he would thus own the beam and be required to compensate its previous owner for its value. They based this ruling on the view that the beam’s nature changed by virtue of the building, and its removal would cause obvious harm to the builder without benefiting the previous owner of the beam. Moreover, the harm done to the original owner can be rectified by compensating him for the value of his property, thus no harm will be caused to either party, as prescribed by Islam. On the other hand, they ruled that if the value of the beam exceeds the value of the entire building, then ownership remains with the previous owner, since that results in the lesser of two evils.

However, Al-Qaḍī Zādah commented on this ruling in the continuation of *Al-Fatḥ* by stating that there should be no differentiation between the case where the beam is worth more than the building and the case where it is worth less. He reasoned that any harm caused to the original owner can be rectified through compensation for the value, while removal of the building would be a sheer harm to the usurper in either case. Thus, he argued, since the harm that was rectified is less important than the sheer harm, the rule of “choosing the lesser of two evils” should be applied in both cases.<sup>62</sup>

For usurped land, the Ḥanafis ruled that if the usurper planted a crop or erected a building, then if the land is worth more than the addition, the

<sup>60</sup>Narrated by ‘Abū Dāwūd and Al-Dāraquṭnī on the authority of ‘Urwah ibn Al-Zubayr as follows: “Whoever reclaims a land owns it, but the labor of a transgressor earns no rights”, c.f. Al-Shawkānī (, vol.5, p.319).

<sup>61</sup>‘Ibn Al-Humām ((Ḥanafī), vol.7, pp.379,383), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, pp.135-7), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.228 onwards), ‘Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.192).

<sup>62</sup>This rule was also applied to many other cases, including a chicken swallowing a pearl, a cow that traps its head in a pot, a camel that gets too big inside a building and cannot leave without demolishing a wall, a gold coin that falls in an inkpot and cannot be taken out without breaking it, etc. In all such cases, they ruled that the one who would sustain the larger loss should compensate the one with the lesser potential loss. Similarly, the Ḥanafis and Ḥanbalis ruled that if a person swallowed a pearl and then died, his belly should not be cut to extract the pearl since the sacredness of a human body exceeds the sacredness of property. Thus, the value of the pearl should be paid to its owner out of the estate of the deceased. In contrast, Al-Shāfi‘ī ruled that it is permissible to cut the person’s belly in this case, in analogy to the case of cutting the belly of a pregnant mother to extract an infant, c.f. ‘Ibn ‘Ābidīn ((Ḥanafī), vol.5, p.135).



usurper is required to remove his additions and returning the cleared land to its owner in its original condition. This ruling is based on their general principle that land cannot be usurped, and thus ownership remains with the original owner. In this regard, the usurper is ruled to have occupied the owner's land with his property, and must hence remove it, since he is a transgressor and his labor earns him no rights. On the other hand, they ruled that if the value of an erected building exceeded the value of the land, then the usurper should be given the right to pay the landlord the value of his land and take it thus.

Moreover, they ruled that if the land would diminish in value by removing the added crop or demolishing the added building, then the owner may compensate the usurper for the value of the removed crop or the building's rubble. This ruling was intended to maximize the benefit, and reduce the harm, for all parties. Thus, the land's value should be assessed with and without the addition that would otherwise be removed, and the owner may pay the difference to the usurper.

Finally, they ruled that if a landlord had prepared his land for planting a crop, and the usurper subsequently planted a crop therein, an automatic *muzāraʿa* contract is established between the owner and the usurper. The crop shares for the two parties in this case are to be determined by convention. In contrast, if the owner had intended to lease the land, then the usurping farmer should keep the entire crop, and pay the landlord the market rent for his land. If the land was not prepared for planting a crop or for rental, then the usurper must pay the landlord a compensation of any diminution in the value of his land caused by the crop. For land established as a mortmain (*waqf*), or for land owned by an orphan, either convention is followed, or market rent is paid, whichever gives the mortmain or the orphan the most benefit. The last ruling follows from their general principle to maximize the benefits of mortmains and the like.

- The Mālikīs ruled as follows:<sup>63</sup>
  - If someone usurped land and built on it, the owner is given an option of demolishing the building at the usurper's expense, or keep it and pay the usurper the value of its rubble after deducting the cost of demolishing it. On the other hand, the owner should not compensate the usurper for any embellishments he may have added to the building, since such additions have no physical value, and the owner's benefits should take precedence since he has the primary right.
  - On the other hand, the Mālikīs and Shāfiʿīs ruled that the owner of a wooden beam that was usurped and used in a building is entitled to take it back, even if that requires demolishing the building.

<sup>63</sup>Ibn Juzayy ((Mālikī), p.331), Al-Dardīr ((Mālikī)A, vol.3, p.448), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.319).



- The usurper of a land who plants trees therein should not be ordered to remove those trees. In this case, the landlord should compensate the usurper for the value of his trees after deducting the cost of removing them, in analogy to the ruling for buildings on usurped land. In contrast, if a person usurped trees and planted them in his own land, then he must uproot the trees from his land.
- If a usurper plants a crop in the land he usurped, then if the landlord takes it back before harvest time, he has the option of removing the crop or leaving it to the usurper and taking the market rent for his land. If the land is taken back after harvest, some jurists said that the owner is entitled to the same option, and some said that the crop would thus belong to the usurper and the owner is only entitled to the market rent of his land.
- The Shāfi'īs ruled<sup>64</sup> that the usurper must remove any building he erected or crop he planted in usurped land. Moreover, they ruled that he must pay financial compensation (*'arsh*) for any diminution in land value caused by his additions, as well as market rent for the period of usurpation. They based those rulings on the Ḥadīth specifying that the labor of a transgressor earns him no rights.

On the other hand, the majority of Shāfi'īs ruled that the owner is not allowed to force the transgressor to give him the additions and be compensated for their value, or keep them and demand market rent from the usurper, since it is possible for the usurper to remove the addition and pay compensation for any resulting diminution in land value.

If the usurper sowed seeds in usurped land, the landlord may force him to remove the seeds, and pay financial compensation for any diminution in land value caused by his action. However, if the landlord decides to keep the seeds in the land, the usurper is not allowed to remove it. Similarly, if the landlord decides to keep a building on his land that the usurper erected, the usurper is not allowed to remove any embellishments he had put therein.

In summary, the Shāfi'īs give the landlord of usurped land the right to remove all additions caused by the usurper without enduring any loss because of their removal.

- The Ḥanbalīs agreed<sup>65</sup> precisely with the Shāfi'ī rulings listed above for buildings erected on and trees planted in usurped land, based on the Ḥadīth establishing that the labor of a transgressor give him no rights. However, they ruled in the case of planting a crop in usurped land that the landlord has the option of keeping the crop until harvest time and

<sup>64</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.289,291), Al-Sha'arānī ((Shāfi'ī), vol.2, p.89 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.371).

<sup>65</sup>Tbn Qudāmah (, vol.5, pp.223-5, 234,245), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, pp.87-94).



taking rent for his land and compensation for any diminution in its value, or taking the crop and paying the usurper compensation for his expenses. The latter option follows from the Ḥadīth: “Whoever plants a crop in the land of another without his permission has no right to the crop, and bears all his expenses”.<sup>66</sup> Another Ḥadīth also states: “Take your crop, and pay him back for his expenses”,<sup>67</sup> meaning the usurper. This ruling seems to be closest to justice and most practical in application.

## 7. Usurped property usufruct and output

We have seen that ‘Abū Ḥanīfa and Muḥammad deemed the output or rent of a usurped property unlawful for the usurper. They based this ruling since any profits thus made would be the outcome of an illegal usurpation of the property of another. Thus, such output should be given away in charity.

We have also seen that ‘Abū Yūsuf and Zufar ruled that the usurper may keep the output or rent, provided that he compensates the owner. They ruled thus based on the Ḥanafī juristic rule that once compensation is paid to the owner, the ownership of the usurped property is retroactively established at the time of usurpation.

The Ḥanafīs also ruled that the usurper does not compensate the owner for the usufruct of usurped property, except in three cases: (i) if the property is established as a mortmain (*wagf*), if it belonged to an orphan, or (iii) if it was prepared for rent. They based this ruling on their rule that usufruct is not valued property, which can only acquire value through the establishment of a lease contract. Moreover, they reasoned that if the usurped property were to perish, the usurper must thus compensate the owner, in accordance with the Ḥadīth: “The guarantor is entitled to the output.”<sup>68</sup> Thus, the judge is only limited to forcing the return of the property to its owner if it remains intact, or compensation for its value if it perished.

We have also reported that the Ḥanafīs ruled that compensation is required for the usufruct of usurped property. They based this rule on their classification of usufruct as valued property. Moreover, Al-‘Izz ibn ‘Abdulsalam reasoned that the apparent purpose for holding any property is to extract its usufruct.<sup>69</sup>

However, the Mālikīs ruled that compensation is required for usurped land or homes only upon their usage. In contrast, they ruled, no compensation is required merely based on disallowing the owner from using his usurped physical

<sup>66</sup>Narrated by ‘Aḥmad and the authors of *Sunan* with the exception of Al-Nasā’ī on the authority of Rāfi‘ ibn Khudayj. It was deemed a Ḥadīth Ḥasan by Al-Bukhārī, c.f. Al-Shawkānī (, vol.5, p.319 onwards).

<sup>67</sup>Narrated by ‘Aḥmad, ‘Abū Dāwūd, Al-Tabarānī, and others that the Prophet (pbuh) saw a crop in the land of Ḥabīb, and liked it. When he (pbuh) commented that he liked the crop of Ḥabīb, he was told that the crop belonged to another person. Then he (pbuh) said: “Take your crop, and pay him compensation for his expenses”, c.f. Al-Shawkānī (, vol.5, p.320).

<sup>68</sup>Narrated by Al-Shāfi‘ī, ‘Aḥmad, and the authors of *Sunan*. Deemed valid by Al-Tirmidhī, ibn Khuzaymah, ibn Al-Jarūd, ibn Hibbān, Al-Ḥākim, and ibn Al-Qaṭṭān, but deemed weak by Al-Bukhārī, c.f. Al-San‘ānī (2nd printing, vol.3, p.30).

<sup>69</sup>‘Izzud-dīn ibn ‘Abdul-Salām’s *Qawā‘id Al-‘Aḥkām* (vol.1, p.152 onwards).



property. On the other hand, if the transgressor merely usurped the usufruct (e.g. by closing a person's house), then he must compensate the owner for having obstructed his use of the property, even if he himself did not use it.

The Shāfi'is and Ḥanbalīs ruled that the usurper is required to compensate the owner for usufruct of usurped property, as well as usurped usufruct. They ruled thus, regardless of whether or not the transgressor himself extracted that usufruct, or merely prevented the owner from doing so.<sup>70</sup>

## 8. Disputes between usurper and owner

There are many cases where the usurper and the owner of usurped property make opposing claims, whereby the usurper would be required to compensate the owner if we believe the latter, and would be absolved thus if we believe the former. In what follows, we shall report a summary of the lengthy treatment jurists of different schools gave to this topic:

- The Ḥanafīs ruled<sup>71</sup> that if the usurper claimed without proof that the usurped property was destroyed in his possession by natural causes, and the owner denied his claim, the judge may incarcerate the usurper for a sufficient period to find the property if it was not destroyed. If the period of incarceration passes without finding the property, then the usurper is required to pay compensation to the owner. This ruling follows from the view that returning usurped property is the primary remedy, and compensation for its value is only an alternative that applies if it is shown that the property cannot be returned.

On the other hand, the usurper's claim is accepted if supported by his oath in all disputes regarding the usurped property, its genus, type, amount, characteristics, or value at usurpation time. This ruling follows from the fact that the owner thus claims that the usurper owes him a certain compensation, and the latter is denying that claim. Hence the denier's claim is accepted if supported by his oath.

In contrast, the usurper must provide proof for any claim that he makes that he had already returned the property to the owner, or that the owner himself had caused a defect in the property. In this case, the usurper is the claimant, and thus he must provide a proof.

If both parties make conflicting claims and provide proofs thereof, the owner's proven claim is given priority, and the usurper is required to compensate him for the property's value. For instance, the owner may claim that his car was made defective by the usurper's excessive usage, while the usurper may claim that he had returned the property to the owner, and each may provide a valid proof for his claim. The usurper's proof in this case may be ignored, since it is possible to return the usurped property,

<sup>70</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.286).

<sup>71</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.163 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.387), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.194).



and then to usurp it again and ride it in a manner that causes the defect claimed by the owner.

- The Mālikīs ruled<sup>72</sup> in agreement with the Ḥanafīs that if neither party provides a proof for his claim regarding the defectiveness of usurped property, its genus, characteristics, or amount, the usurper's claim is accepted if supported by his oath.
- The Shāfi'īs and Ḥanbalīs ruled<sup>73</sup> similarly that the usurper's claim is accepted if backed by his oath in disputes over the value of usurped property. Thus, they reasoned that the default is absolution of responsibility for the claimed excess, and the owner needs to provide a proof for his claim.

Similarly, they ruled that if the usurper claimed that the property perished while the owner claimed that it remained intact, the usurper's claim is accepted if backed by his oath. They based this ruling on the extreme difficulty of proving that a property had perished. Moreover, if they disagreed about the amount or characteristics of the property, with neither party providing a proof, the usurper's claim is accepted if backed by his oath. The latter ruling follows from the familiar rule that the denier's claim is accepted over the claimant's if backed by his oath.

In contrast, they ruled in agreement with the Ḥanafīs that the owner's claim is accepted if the usurper claimed that he had returned the property, and the owner denied that claim. In this case, the default is considered to be that the property was not returned, and thus the owner is the denier of the usurper's claim. Similarly, they ruled that if the owner denied the usurper's claim that the property was defective, the owner's claim is accepted if backed by his oath. In the latter case, the default is deemed to be that the property was free from defects.

## 9. Usurpation from the usurper

Jurists of the four schools agree<sup>74</sup> that the owner has an option if his usurped property is later usurped from the usurper, and perishes in the possession of the second usurper. If he wishes, he may demand compensation from the first usurper due to his transgression by taking the property out of his control. Alternatively, he may seek compensation from the second usurper in whose possession the property perished, whether or not the second usurper knew that the property was already usurped. The liability of the second usurper follows from his own removal of the property from the control of the first usurper who was capable of returning the property to its owner. Moreover, the second usurper took

<sup>72</sup> Al-Dardīr ((Mālikī)A, vol.3, p.456), 'Ibn Juzayy ((Mālikī), p.331).

<sup>73</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.287), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.376), 'Ibn Qudāmah (, vol.5, p.272), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.125).

<sup>74</sup> Al-Kāsānī ((Ḥanafī), vol.7, pp.144,146), 'Ibn Nujaym (1290H (Ḥanafī), vol.2, p.96 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.126 onwards, 139), Al-Dardīr ((Mālikī)A, vol.3, p.457), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.279), *Faṭḥ Al-ʿAzīz Sharḥ Al-Wajīz* (vol.11, p.252), 'Ibn Qudāmah (, vol.5, p.252), *Al-Majallāh* (item #910).



control of a property that was not his, and ignorance of the ultimate owner is not an excuse that negates his responsibility for compensation. Finally, the second usurper caused the property to perish, and thus is liable for compensation. This reasoning was legally formalized as the attachment of the owner's right to a property regardless of who has possession and control at any point in time.

Thus, if the owner seeks compensation from the first usurper, and the property had perished in the possession of the second usurper, the first usurper is entitled to demand compensation from the second usurper. The Ḥanafis based this ruling on their principle that the first usurper by paying compensation owns the property retroactively from the time of usurpation. Thus, they reasoned that the second usurper merely becomes a usurper of the first usurper's property. The non-Ḥanafis based the same ruling on the fact that the first usurper would have borne the cost of compensation without causing the property to perish, and thus equity demands seeking compensation from the one who caused it to.

If the owner chooses to seek compensation from the second usurper who caused the property to perish, the latter has no recourse to demanding compensation from anyone else. Thus, the second usurper would have compensated the owner for his own actions of usurping the property and causing its destruction.

The jurists further ruled that the owner's option allows him to take some of the compensation from one usurper, and some from the other.

The Ḥanafis reported an exception to this rule of giving the owner an option of usurper to compensate him. Thus, they ruled that if property designated as a *waqf* is usurped and then usurped again, and if the second usurper was richer than the first, the guardian of the *waqf* must seek compensation from the second usurper alone.

Moreover, the majority of Ḥanafis ruled that once the owner chooses one usurper from whom to seek compensation, the other usurper is absolved of responsibility for compensation by the very choice made by the owner. Thus, the owner may not later change his mind and decide to seek compensation from the other usurper.

They also ruled that if the second usurper returned the property to the first usurper, he would thus be absolved of his guaranty. Moreover, if either usurper returns the property to the owner, both usurpers would be absolved of guaranty.<sup>75</sup>

### Dealings of the usurper

The Ḥanafis ruled<sup>76</sup> that if the usurper leased the property, sold it, pawned it, deposited it, or lent it to another, and then the property perished in the latter's possession, then the owner has the option of seeking compensation from the usurper or the one with whom he dealt. Thus, if the owner takes compensation from the usurper, the latter has no recourse to seeking compensation from anyone else. In contrast, if the owner seeks compensation from the lessee, buyer,

<sup>75</sup> *Al-Majallah* (item #911), 'Ibn c'Ābidīn ((Ḥanafī), vol.5, p.138).

<sup>76</sup> 'Ibn c'Ābidīn ((Ḥanafī), vol.5, p.139).



depository, or recipient of the property in pawning, the latter can in turn seek compensation from the usurper. The latter ruling is made on the basis of such parties receiving the property as part of dealing with the usurper, in analogy to a buyer, who is entitled to repayment of his price upon compensating the seller for the value of his merchandise. In this context, payment of the property's value is equivalent to returning the property itself.

In contrast, they ruled that a person who borrowed the usurped property, or received it as a gift or charity, is ultimately responsible for compensating the owner, whether or not he knew that the property was usurped. They based this ruling on the premise that receipt in such cases is made for the recipient's sake alone.

On the other hand, the Shāfi'is ruled<sup>77</sup> that all possessions subsequent to the possession of the usurper are deemed possessions of guaranty, whether or not the possessors of the property are aware of the prior usurpation. They based this ruling on the premise that the possessor in all such cases would thus be in possession of the property of another without his permission. In this regard, ignorance of the previous usurpation does not remove the guaranty, but merely removes sinfulness of the possession. Thus, the owner has the option of demanding compensation from the usurper or the subsequent possessor of his property.

However, they ruled in this case that ultimate liability for compensating the owner only falls with the second possessor of the property if he knew of its usurpation, which makes him a usurper as well. If the second possessor did not know of the usurpation, but held the property in a possession of guaranty (e.g. as a borrower, a buyer, or one in the process of negotiating the price), he would still be the ultimate guarantor, since the usurper thus did not deceive him.

In contrast, if the second possessor did not know of the usurpation, and held the property in a possession of trust (e.g. as a depository or entrepreneur in a silent partnership), then ultimate liability for compensating the owner would fall on the usurper. This ruling follows from the fact that he dealt with the usurper on condition that his possession is merely as an agent of the usurper's. On the other hand, most Shāfi'is ruled that the recipient of usurped property as a gift has ultimate responsibility for compensating the owner. In the latter case, even though the recipient's possession was not a possession of guaranty, he received the property to own it.

In summary: if the possessor of the property did not know of its previous usurpation, the Ḥanafis and Shāfi'is make him ultimately responsible for compensating the owner only if he received it in a simple loan, a gift, or charity. If the property was received in a deposit or silent partnership, in which cases it was held in a possession of trust, the usurper would be ultimately responsible for compensation. Moreover, the Ḥanafis and Shāfi'is agree that the owner always has the option of demanding compensation from the usurper or whoever received the property from him.

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<sup>77</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.279).



### Usurped property expenses

The usurper is responsible for all the expenses of a usurped property during usurpation, by virtue of his transgression. On the other hand, the Mālikīs ruled<sup>78</sup> that the usurper is only responsible for all necessary expenses (e.g. feeding the usurped animal, watering the land and treating it, tending to trees, etc.), in exchange for any output that the usurper derives from the usurped property. Thus, they reasoned, the transgressor should not be transgressed upon, and must receive a compensation for his expenses. However, if the usurper spent more on the usurped property than the output he derived from it, or if the property produced no output, the usurper is not entitled to any compensation for his expenses. In contrast, if the property's output exceeded the expenses borne by the usurper, the owner may seek compensation for the excess.

We have seen that the Ḥanbalīs ruled<sup>79</sup> in disagreement with other schools that if a usurper takes agricultural land and farms it, the landlord may take the crop and compensate the farmer/usurper for his expenses. They based this ruling on the Ḥadīth: “Whoever plants a crop in the land of others without their permission has no right to the crop, but has a right to be compensated for his expenses”.<sup>80</sup> Alternatively, they ruled, the landlord may keep the crop in his land to harvest time, and take from the usurper the market rent for his land plus compensation for any diminution in its value due to planting that crop.

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<sup>78</sup> Al-Dardīr ((Mālikī)B, vol.3, p.598).

<sup>79</sup> Ibn Qudāmah (, vol.5, p.392).

<sup>80</sup> Narrated by 'Abū Dāwūd and Al-Tirmidhī, who deemed it a Ḥadīth ḥasan.



## Part XXII

# Fighting an Assailant



## Chapter 117

# Destruction of Property (*Al-’Itlāf*)

Destruction of property is often associated with usurpation, since it derives its legal status rulings from the establishment of guaranty. We shall cover this topic in three sections:

1. Definition and establishment of guaranty.
2. Conditions for establishing guaranty.
3. The nature of guaranty and means of compensation.

### 117.1 Definition, and establishment of guaranty

Destruction of property<sup>1</sup> is defined as causing any change in the property that makes it impossible to use in the usual manner.<sup>2</sup> It is a cause for establishing guaranty, since it constitutes a transgression that causes harm to the owner. Proof for this is derived from the verse: “Whoever transgresses against you, punish him in the same manner that he harmed you” [2:194], and the Ḥadīth: “No causing of harm is allowed in Islam”. In this regard, if guaranty and the requirement for compensation is establishment by virtue of usurpation, it is more appropriate to establish guaranty in the case of destruction of property, which constitutes a sheer harm and transgression.

In this regard, jurists do not distinguish between immediate destruction of property and destruction that is caused by indirect actions. Moreover, they do not distinguish between guaranties caused by intentional or unintentional

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<sup>1</sup>Various notions of destruction, causing defect, or consumption of property are deemed to be similar in juristic writings. All of those concepts fall under the more general notion of causing harm to others through diminishing their property.

<sup>2</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.164).



destruction of property, and between cases of transgressors' sanity, discernment, and being of legal age, or lack thereof.

However, the Mālikīs distinguished between the case of a discerning and a non-discerning child. Thus, they ruled that a discerning child should pay compensation out of his own property if he has any, or otherwise be liable for such compensation. On the other hand, some Mālikīs ruled that non-discerning children and insane individuals are not liable for compensating any properties that they destroy.<sup>3</sup> However, the majority of Mālikīs ruled that the discerning and the non-discerning are equally liable for compensation, to make the harmed party whole.

Despite this general agreement on principle among the four schools, jurists differed in opinion regarding the establishment of guaranty in specific cases. In what follows, we shall review their respective rulings on some of those special cases.

### 117.1.1 Leaving a store open

This special case refers to an individual who left a store open, or otherwise allowed a thief to steal a property or allowed the property (birds or animals) to escape. In this case:

- 'Abū Ḥanīfa and 'Abū Yūsuf ruled<sup>4</sup> that the perpetrator does not guarantee the property in this case. They based their ruling on the fact that leaving the store open or releasing animals or birds by themselves are not direct causes of destruction or loss of property, and other forces (a thief, the animal's actions, a flood, etc.) were required.
- The Mālikīs, Ḥanbalīs, and Muḥammad ibn Al-Ḥasan ruled<sup>5</sup> that the perpetrator of such acts is responsible for compensation, since the subsequent harm was predictable under normal circumstances. This seems to be the most logical and equitable opinion, and indeed *Al-Majallah* (item #922) had already listed that opinion as the accepted one.
- The Shāfi'īs differentiated between different subcategories of this case.<sup>6</sup> Thus they ruled that if a person opened a birdcage and excited it to fly away, then he would be liable for compensation if the bird fled promptly with the assistance he provided. Moreover, if he had only opened the

<sup>3</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.139), 'Ibn Nujaym (1290H (Ḥanafī), vol.1, p.77), 'Ibn 'Abidīn ((Ḥanafī), vol.5, pp.378,415), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.404 onwards), 'Ibn Juzayy ((Mālikī), pp.332-3), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.277), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.128).

<sup>4</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.166), *Jāmi' Al-Fuṣūlayn* (vol.2, p.115 onwards), *Majma' Al-Damānāt* (p.148).

<sup>5</sup>Al-Dardīr ((Mālikī)A, vol.3, p.451), 'Ibn Juzayy ((Mālikī), p.332), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.128 onwards), 'Ibn Qudāmah (, vol.5, pp.280,282), 'Ibn Rajab (1st edition (Ḥanbalī), p.285).

<sup>6</sup>*Fath Al-'Azīz Sharḥ Al-Wajīz* (vol.11, p.245 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.278), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.374 onwards).



birdcage, most Shāfi'is still ruled that he is liable if the bird fled right away. On the other hand, if the bird stayed for a while before flying, they ruled that it fled of its own will without the transgressor's direct assistance.

The same analysis to the three cases was also applied to untying animals or opening a stable door. Moreover, they ruled that the transgressor is liable for compensation if he gave an animal access to food that it ate promptly.

In contrast, they ruled that if a transgressor merely opened the door of a store which was thus robbed, or if he pointed a thief to the store, the transgressor is not deemed liable for compensation. They ruled thus by arguing that those actions by themselves are not sufficient to establish guaranty.

They further considered the case of releasing a ship, which promptly sank, in which case the perpetrator is liable for compensation, since his action thus caused the sinking directly. On the other hand, if the ship floated for a while, and later sank due to another cause, e.g. in a storm, his action would not have directly caused its sinking, and he would not be liable. If the ship merely floated for a while and then sank with no clear other cause, some jurists ruled that he would thus be liable since water is a source of destruction, and others ruled that he would not be liable in analogy to the case described below.

### 117.1.2 Opening a fat container

Jurists issued a number of rulings regarding the liability of an individual who opens a container filled with oil, ghee, or other fats:

- 'Abū Ḥanīfa and 'Abū Yūsuf ruled<sup>7</sup> that if the jug contained liquid oil which was thus spilled, the transgressor must thus compensate the owner. On the other hand, if the jug contained solid ghee, which later melted and spilled, he would not be liable for compensation. They based the ruling in the first case on the fact that liquids naturally spill when allowed to do so, and thus the perpetrator caused it directly to spill. In contrast, solid ghee does not naturally spill, and it is only heat that turns it to liquid and spills it. Thus, the perpetrator in the second case is not considered a direct cause of property destruction.
- The Mālikīs, the Ḥanbalīs, and Muḥammad ibn Al-Ḥasan ruled<sup>8</sup> that the perpetrator is liable for compensation if the jug was lying on the ground, whether its contents spilled immediately upon opening, or later after melting or by any other cause. In all such cases, they ruled that

<sup>7</sup> Al-Kāsānī ((Ḥanafī), vol.7, p.166), *Majma' Al-Damānāt* (pp.148,153).

<sup>8</sup> Ibn Juzayy ((Mālikī), p.332), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.129), Al-Kāsānī ((Ḥanafī), vol.7, p.166).



the perpetrator is a transgressor regardless of the timing of property loss. This seems to be the most appropriate ruling in this case.

- The Shāfi'is ruled<sup>9</sup> in agreement with the Mālikīs that the transgressor must compensate the owner if the container was lying on the floor, and its contents spilled and were ruined immediately upon opening, or after a while due to heat or other factors, and regardless of whether or not the owner was present and could prevent the spillage. On the other hand, if the container was upright on some object, he would only guarantee it if it fell and spillage occurred as a cause of his act of opening it, otherwise he would not be liable if the container fell later due to other reasons. In the final case, the perpetrator is not deemed to be the cause of actual destruction of property.

### 117.1.3 Terrorization

Jurists disagreed over the case where a ruler sent for a woman to be brought to court, and she was frightened to the point of losing a fetus she was carrying, or losing her mind:

- 'Abū Ḥanīfa and 'ibn Ḥazm ruled<sup>10</sup> that no party is responsible for compensation in this case, since the outcome is in no way connected to the action.
- The majority of jurists ruled<sup>11</sup> that the ruler must thus pay financial compensation for the loss of life (*diyyah*), in analogy to the case when 'Umar called for a woman and she lost her fetus.

### 117.1.4 Detention and incarceration

If someone prevents an owner from tending to his property until it is ruined, the majority of Ḥanafis ruled that he must thus compensate him if the property was movable, but not if it was immovable.<sup>12</sup> 'Abū Ḥanīfa and 'Abū Yūsuf supported this ruling on their principle that usurpation is not possible for immovable properties. In contrast, Muḥammad argued that both types of property are subject to usurpation.

The Mālikīs and Ḥanbalīs ruled<sup>13</sup> in this case that the perpetrator caused the property loss, and thus must compensate the owner.

<sup>9</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.278), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.375), Al-Ramlī ((Shāfi'ī), vol.4, p.111 onwards).

<sup>10</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.397), *Majma' Al-Ḍamānāt* (p.172), *Al-La'ālī' Al-Durriyah fī Al-Fawā'id Al-Khayriyyah* (vol.2, p.112), 'Ibn Ḥazm (, vol.11, p.29 onwards).

<sup>11</sup>Al-Dardīr ((Mālikī)A, vol.4, p.244), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.192), 'Ibn Qudāmah (, vol.7, p.832 onwards).

<sup>12</sup>*Jāmi' Al-Fuṣūlayn* (vol.2, p.117), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.189).

<sup>13</sup>Al-Dardīr ((Mālikī)A, vol.4, p.242), 'Ibn Qudāmah (, vol.5, p.223; vol.7, p.834).



The Shāfi'īs ruled<sup>14</sup> that the perpetrator is liable for compensation if it was his intention to prevent the owner from tending to his property. Otherwise, if that was not his intention, then he should not be liable since his action was against the owner and not against his property.

## 117.2 Conditions for establishing guaranty

Jurists listed the following conditions that must be satisfied for destruction of property to result in a requirement of compensating the owner:

1. The destroyed object must be property. Thus destruction of objects that customarily and legally do not qualify as property (e.g. dead animals and their skin, blood, dogs, etc.) does not result in guaranty.
2. The property must be valued from the vantage point of the owner. Thus, no guaranty is established for destruction of wine or pork that belonged to a Muslim, regardless of the perpetrator's religion. In contrast, the destroyer of wine or pork that belonged to a non-Muslim must compensate him. If the perpetrator is Muslim, he must compensate him for the value, and the Ḥanafīs and Mālikīs ruled that non-Muslims should compensate such properties in-kind. In contrast, the Shāfi'īs and Ḥanbalīs ruled that such objects that are not deemed properties for Muslims should not be compensated, in analogy to the ruling for destruction of non-properties.

The majority of jurists, including 'Abū Yūsuf and Muḥammad ruled that the destruction of idols and musical instruments does not result in guaranty, since they deemed such properties non-valued based on the prohibition of their use. In contrast, 'Abū Ḥanīfa and Al-Shāfi'ī ruled that the value of raw materials of such properties should be guaranteed, and thus the wood of such objects is considered valued property for which compensation is required.

No guaranty is established for the destruction of ownerless properties, since they are non-valued. In this regard, we recall that such properties only become valued upon being taken into the possession of an individual.

Moreover, jurists argued that there is no guaranty for burning books of idolatry that teach lies and disbelief. They reasoned that such subversive books are more worthy of destruction than musical instruments and containers of wine, and the Prophet (pbuh) ordered the destruction of such containers.<sup>15</sup> Further proof for this view is provided by the fact that the Prophet's (pbuh) companions burned all *muṣḥafs* written in a different hand or different dialect from the one unified under *Uthmān*, for fear of having excessive differences in recitation result in divisions among Muslims.<sup>16</sup>

<sup>14</sup> *Fath Al-ʿAzīz Sharḥ Al-Wajīz* (vol.11, p.247), Al-Ramī ((Shāfi'ī), vol.4, p.112), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.283).

<sup>15</sup> Al-Shawkānī (, vol.5, p.329 onwards).

<sup>16</sup> Ibn Qayyim Al-Jawziyyah ((Ḥanbalī)b, p.271 onwards, 275).



3. The damage caused to the property must be permanent. Thus, if the property is restored to its original condition, no compensation will be required. In this case, all harm caused by the original diminution is deemed to be removed, and any compensation that may have been received for that diminution must be returned to the transgressor. Thus, 'Abū Ḥanīfa and others ruled that the condition for establishing guaranty is the perpetual impossibility of utilizing the destroyed property, and returning the property to its original state negates this condition. In contrast, 'Abū Yūsuf and Muḥammad ruled that the transgressor should pay full compensation, by virtue of his transgression, considering recovery of the property to be a new gift from Allāh.<sup>17</sup>
4. The majority of the jurists ruled that the destroyer of property must meet eligibility conditions to be liable for compensation. Thus, the owner of an animal would not be liable for properties that it destroys. In contrast, we have seen that some Mālikīs ruled that compensation is required even if the destroyer is not discerning.<sup>18</sup>
5. The establishment of guaranty must be beneficial to the owner. Thus, if the guaranty and the resulting liability for and payment of compensation cannot be enforced, there is no point in establishing guaranty.

Consequently, jurists ruled that no liability for compensation is established for a Muslim who destroyed the property of an enemy of Islam, or for the destruction of an enemy of a Muslim's property in the Land of War. In the first case, the enemy's property rights are not recognized by the Muslim, and in the second, no Muslim ruler has jurisdiction to enforce a guaranty. Due to the first example, jurists stipulated a condition in guaranty that the destroyed property rights must be recognized in Islam.<sup>19</sup>

Similarly, the Ḥanafis ruled that no guaranty is established for righteous people destroying the property of religious transgressors (e.g. Al-Khawārij and others who declared civil wars against their fellow Muslims), or vice versa. The non-Ḥanafis restricted this ruling to the case of military conflict between the two groups, to give other transgressors who did not declare a war on Muslims an excuse for possible differences in interpreting religious commands.<sup>20</sup>

The Shāfi'īs stipulated one further condition<sup>21</sup> that the owner's possession of the property must be established. Thus, they ruled that if the owner had a bird in an open cage, and a passerby scared him unintentionally into flying, he would not be required to compensate the owner. They also ruled

<sup>17</sup> Al-Kāsānī ((Ḥanafī), vol.7, pp.155,157), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.137),  
<sup>c</sup> Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.3, p.190).

<sup>18</sup> Indeed, this latter opinion is the one adopted in *Al-Majallah* (item #916).

<sup>19</sup> Al-Ramlī ((Shāfi'ī), vol.4, p.111).

<sup>20</sup> Al-Dardīr ((Mālikī)A, vol.3, p.442; vol.4, p.300), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.277 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.128).

<sup>21</sup> Al-Ramlī ((Shāfi'ī), vol.4, p.113).



based on this condition that a buyer is not responsible for any defects that occur in the merchandise prior to receiving it.

The Ḥanafīs listed three conditions for establishing a liability for compensation on a person who caused a loss in property:<sup>22</sup>

1. The one who caused destruction of property must be a transgressor, i.e. must have acted outside the domain of permissible actions. Transgressions include digging a well in the public road without official permission, in the property of another without his permission, or digging a well with permission, but without taking proper precautions, and thus causing an animal or human being to fall therein. Other examples include lighting a fire on a windy day, causing others' properties to be burned, causing spillage of liquid in a container, destroying important legal documents, etc.
2. The act must be intentional, e.g. by taking the watering rights of another to benefit oneself, or blocking a ditch that watered a neighbor's land, etc. However, the true meaning of intention in this case is subsumed under the notion of transgression, whether or not the transgressor intended to cause harm. Thus, even an insane person's actions may make him liable for compensation if he shouts at a person's riding animal and causes him to fall. Indeed, the juristic rule in this context is: "The one who caused harm is responsible for compensation only if he transgressed", and "Whoever caused a loss immediately is liable for compensation, even if he was not a transgressor".
3. The cause must indisputably lead to the harmful effect, i.e. no other conventional reason for the loss was present. Thus, if a more immediate cause of the loss can be found, it should be attributed to that cause.

In this regard, if the suspected act normally does not cause loss of property (e.g. digging a well without permission), and then another person threw an animal into that well to kill him, the latter would be responsible for compensation and not the former. On the other hand, if an animal merely fell into the well by itself, then the one who dug the well must pay its compensation.

On the other hand, if the suspected act commonly causes the loss, but a second direct cause was also present, then the two parties share liability for compensation.

In this regard, we reiterate that jurists did not require the guarantor of property that he destroyed to be discerning or of legal age. Moreover, necessity does not absolve the liable party of his guaranty. Thus, if a starving person has to eat the property of another to survive, he is still

<sup>22</sup> *Jāmi' Al-Fuṣūlayn* (vol.2, pp.116,112,124), *Majma' Al-Ḍamānāt* (p.323) Sh. Kḥālīd Al-'Atāsī's *Sharḥ Al-Majallāh*, 'Ibn Rajab (1st edition (Ḥanbalī), p.190 onwards), Al-Qarāfi ((Mālikī), vol.4, p.27; vol.2, p.208), Al-Kḥaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.278).



required to compensate the owner. This ruling follows from the juristic rule: “Necessity does not void the rights of others”.

Moreover, ignorance that a property belongs to another does not void the transgressor’s guaranty of destroyed property. Thus, even if a person destroyed property that he thought was his own, he would be liable for paying compensation to the true owner. In this regard, destroying the property of another knowingly earns the transgressor both: religious sinfulness, as well as liability for compensation. In contrast, destroying the property of another unknowingly only establishes liability without sinfulness. This latter ruling follows from the Ḥadīth: “Allāh has disregarded for my nation their mistakes, forgetfulness, and coerced acts”.<sup>23</sup>

### 117.3 Means of compensation

Rulings for the method of compensation in property destruction are the same as their counterparts for usurped properties. Thus, if the destroyed property was fungible, it should be compensated in kind, if at all possible. This ruling follows from the fact that guaranty in this case is established by virtue of transgression, which requires in-kind compensation. If compensation in-kind is not possible for any reason, then compensation in value is required, in analogy to the rulings for usurped property.<sup>24</sup>

<sup>23</sup>Ḥadīth Ḥasan narrated by ‘ibn Mājah, Al-Bayhaqī, and others on the authority of ‘ibn ‘Abbās (mAbpwt).

<sup>24</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.168), ‘Ibn Juzayy ((Mālikī), p.332), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.284), Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.246). In this regard, the Ḥanbalīs ruled that if the destroyed property was fungible but its equal could not be found, then its value is established as a liability on the day its equal ceased to exist, and thus should be assessed on that day, c.f. ‘Ibn Qudāmah (, vol.5, p.258).



## Chapter 118

# Legality, stages and legal status

If a transgressor attacks a person's self, property or honor, the assaulted party and others are authorized to exercise the amount of force they deem necessary to prevent the assault. In this regard, one must begin with the most amount of restraint in using force, and gradually increase the level of force to stop the assault with minimal counter-assault. In this context, verbal means are deemed the mildest, followed by using one's hand, followed by using a whip, followed by using a stick, followed by severing a limb, and at the very end resorting to killing the assailant. Thus, if the assailant credibly threatens the use of deadly force (e.g. by raising his sword), necessity might dictate killing him to protect oneself or others.

Thus, the use of force in this case was stipulated as an exception to the general juristic rule that "harm cannot be removed with harm". However, the use of minimal force to avoid assault is still required in this case. Thus, the Shāfi'is, the Mālikīs, and some of the Ḥanbalīs ruled that if it is possible to escape the assailant and seek refuge and safety with others, then fighting the assailant would be deemed forbidden.<sup>1</sup> Moreover, Al-ʿIzz ʿibn ʿAbdulsalām ruled that if the assailants were to stop their assault, then fighting them and killing them becomes forbidden.<sup>2</sup>

There are numerous proofs of the legality of forceful prevention of assault. For instance, proof in the Qur'an is provided by the verse: "Punish those who attack you in the same manner that they harm you, but be wary of Allāh, and know that Allāh is with those who are God-wary" [2:194]. This order to be God-wary is proof that the use of force should be proportional, and that minimal effective force should be used in preventing assault.

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.93), 'Ibn ʿĀbidīn ((Ḥanafī), vol.3, p.197), Al-Dardīr ((Mālikī)A, vol.4, p.357), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.319), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, pp.196-7), 'Ibn Qudāmāh (, vol.8, pp.329-331).

<sup>2</sup>*Qawā'id Al-'Aḥkām* (vol.1, p.195)



There are a number of Ḥadīth that support the right to use force in this context. One such Ḥadīth states: “Whoever dies defending his religion, his life, his property, or his family, is a martyr”.<sup>3</sup> This Ḥadīth, and its mention of martyrdom, provides proof of the permissibility of using force to defend religion, self, property, and honor.

Moreover, defending others with force is legalized on the basis of the general principle of protecting the sanctity of life and property. Indeed, were it not for cooperation in protecting one another, many a person and his property would be easy prey for criminals. In this regard, the Prophet (pbuh) said: “Support your brother, oppressor or oppressed. They asked: How do we support him as an oppressor? He (pbuh) said: by preventing him from oppression, that is a form of support”.<sup>4</sup> He (pbuh) also said: “Whoever witnesses a believer being oppressed and does not help him despite his ability, Allāh will humiliate him on the day of judgment in front of all witnesses”.<sup>5</sup> In another Ḥadīth, he (pbuh) said: “True believers assist each other in fighting devils”.<sup>6</sup>

Therefore, all jurists ruled that the legal status of legitimate defense of religion, self, property, or honor, is permissibility.<sup>7</sup> Thus, the defender is only liable financially and legally if he exceeds the limits of permissible activity. In this regard, the defender is only permitted to kill the assailant if he has proof that this was required to stop him (e.g. if witnesses saw the assailant carrying a lethal weapon and seemed ready to use it). Thus, the defendant would not be acquitted if he merely claims that the assailant attacked his home, and that he could not stop him without killing him. Similarly, it is not sufficient for acquittal that witnesses saw the assailant enter the house, if they do not mention his readiness to use a lethal weapon. On the other hand, if no witnesses were available to testify in this case, the Mālikīs ruled that the defender’s claim is accepted if backed by his testimony.<sup>8</sup>

<sup>3</sup>Narrated by the four authors of *Sunan*, and deemed valid by Al-Tirmidhī on the authority of Saʿīd ibn Zayd, c.f. Al-Ṣanʿānī (2nd printing, vol.4, p.40).

<sup>4</sup>Narrated by ʿAḥmad, Al-Bukhārī, and Al-Tirmidhī on the authority of ʿAnas ibn Mālik.

<sup>5</sup>Narrated by ʿAḥmad on the authority of Sahl ibn Ḥandīf, c.f. Al-Shawkānī (, vol.5, p.327).

<sup>6</sup>Narrated by ʿAbū Dāwūd.

<sup>7</sup>ibid., *Nazarīyyat Al-Ḍarūrah Al-Sharʿīyyah* by Dr. Al-Zuhaylī (pp.140-2).

<sup>8</sup>Al-Dardīr ((Mālikī)A, vol.4, p.357), ʿIbn Qudāmāh (, vol.8, p.333).



## Chapter 119

# Conditions for Fighting an Assailant

There are four conditions for the permissibility of fighting an assailant:<sup>1</sup>

1. The majority of jurists ruled that an actual assault is required for fighting the assailant. On the other hand, the Ḥanafīs stipulated that the assault must also itself be a punishable crime. In this regard, legitimate corporal punishment at home, in school, or in court, is not considered by the Ḥanafīs to be an assault. Moreover, the actions of children, the insane, and animals, cannot be described as criminal, and hence do not qualify as assaults in the Ḥanafī school.

The Ḥanafīs ruled that if a man kills an animal that attacked him, he must instantly guarantee its value, in accordance with their rule that properties must be guaranteed at the time of their destruction. This ruling follows from their juristic principle that “necessity does not negate the rights of others”, as well as their decision not to classify any animal’s action as an assault.

In contrast, the non-Ḥanafīs ruled in this case that the man is not responsible for any compensation if the only way to protect himself was to kill the animal. They ruled thus based on necessity, and in analogy to killing a human assailant, where the sanctity of human life clearly exceeds that of property. This ruling is also analogous to the permissibility of killing animals that are forbidden to hunt (based on the pilgrimage season or location) if they attack. In this regard, the jurists distinguished between the necessity of killing the assailing animal and the necessity of eating the food of others. The difference in the latter case (where the owner of the food is still entitled to compensation) is that the food did not force the person to destroy it, and thus its sanctity (as the property of another) was

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<sup>1</sup> *Al-Tashrīc Al-Jināʿi Al-Islāmī* by the late ʿAbdulqāder ʿŪdah (vol.1, p.278 onwards).



never negated.<sup>2</sup> The non-Ḥanafī opinions regarding assaults by animals, children, and the insane, seem to be the most appropriate.

2. There must be an actual ongoing assault, not merely the threat of future assault.
3. There must be no other way to prevent the assault without using force. Thus, if it was possible to seek help from others or the police, but the assaulted party decided instead to use force, he would thus be deemed a transgressor.
4. Only the appropriate measure of force should be used, as best assessed by the assailed party. Thus, minimal force should be considered and tried before more forceful techniques are applied.

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<sup>2</sup>Al-Kāsānī ((Ḥanafī), vol.7, p.273), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.319), 'Ibn Qudāmah (, vol.8, p.328 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.225), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.143), Al-Dardīr ((Mālikī)A, vol.4, p.357).



## Chapter 120

# Is Fighting the Assailant Required?

To study the rulings in this chapter, we need to consider each type of legitimate defense separately.

### 120.1 Self defense

'Abū Ḥanīfa, the Mālikīs, and the Shāfi'īs ruled that an individual is required to defend himself if attacked by another human being or by an animal that attempts to kill him or sever his limb.<sup>1</sup>

However, the Shāfi'īs restricted the requirement of fighting the assailant to non-Muslim and animal assailants, reasoning that surrendering to a non-Muslim humiliates Islam, and animal life is less important than human life. On the other hand, the Shāfi'īs ruled that it is permissible to surrender to a Muslim assailant. Indeed, they ruled that it is better to do so, based on the narration of 'Abū Dāwūd: “Be the better of Adam’s two sons”, which the Prophet’s (pbuh) companions repeated and practiced without any blame. The Shāfi'īs further ruled that the demarcation between permissibility and requirement of fighting an assailant of oneself are the same for fighting the assailant of others.

The Mālikīs restricted the requirement of fighting the assailant by ruling that it is better to warn the assailant first if possible. They ruled thus in analogy to the case of declaration of war. Thus, the assaulted party should first ask the assailant to desist, but if he does not, then he may fight him, even kill him if necessary.

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<sup>1</sup> Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.110), Al-Kāsānī ((Ḥanafī), vol.7, p.93), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.269), 'Ibn 'Ābidīn ((Ḥanafī), vol.2, p.197; vol.5, p.387), Indian Authors ((Ḥanafī), vol.6, pp.7, 51), Al-Ḥaṭṭāb (1st edition (Mālikī), vol.6, p.323), Al-Dardīr ((Mālikī)A, vol.4, p.357), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.6, p.61), Al-Suyūṭī (b, vol.2, p.220), Al-Qarāfi ((Mālikī), vol.4, p.185), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, pp.21,195), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.225).



The jurists who ruled that self defense is a requirement relied for proof on the verses: “Make not your hands throw you into destruction” [2:195], “Then fight against the transgressing party until it complies with the command of Allāh” [49:9], “Whoever transgresses against you, punish him in the same manner that he hurt you” [2:194], “The reward of a mistreatment is equal mistreatment” [42:40]. They further reasoned that just as man is required to sustain himself by eating whatever he finds if he is starving, he is required to defend himself against an assailant.

The Ḥanbalīs ruled<sup>2</sup> in harmony with the Prophetic tradition that fighting the assailant is permissible, but not required, whether the assailant is a child, a grown-up, or insane. They based this ruling on the Prophet’s (pbuh) order in the case of great trials for Muslims: “Stay at home, and if you fear that sunlight will blind your eye, then cover your face”. In another narration, the Prophet (pbuh) is narrated to have said: “There will come a time of great trial, so be the slain slave of Allāh, and be not the killer”.<sup>3</sup> Moreover, there is a valid narration that ‘Uthmān forbade his four hundred slaves from defending him, and further told them that whoever dropped his weapon among them earned his freedom thus.

In this regard, the Ḥanbalīs differentiated between the case of defending oneself and eating to avoid starvation. They thus reasoned that in death at the hands of an assailant, one attains martyrdom and saves the life of another, while eating only sustains one’s own life.

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<sup>2</sup>Ibn Qudāmāh (, vol.8, p.329 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.143).

<sup>3</sup>Narrated by ‘Ibn ‘Abī Ḳhaythama and Al-Dāraqūṭnī on the authority of ‘Abdullāh ibn Ḳhabbāb ibn Al-’Art. Also narrated in similar fashion by ‘Aḥmad on the authority of Ḳhālīd ibn ‘Arfaṭah.



## Chapter 121

# Compensation for Fighting an Assailant

Jurists are in agreement<sup>1</sup> that an assaulted individual who kills his assailant bears no civil or criminal liability. This ruling follows from the Ḥadīth: “Whoever raises his sword and attacks with it has thus made his blood permissible”.<sup>2</sup> Moreover, the assailant is deemed to be the transgressor, and the assaulted was merely defending himself.<sup>3</sup>

However, the Ḥanafīs stipulated exceptions for this rule if the assailant was a child, an insane person, or an animal. In those cases, they ruled that if the assaulted party killed the assailant, he would bear no criminal liability, but will bear civil liability for paying financial compensation (*diyyah*) for a child or insane person, or the value of the animal. In contrast, ‘Abū Yūsuf ruled that civil liability only applies in the case of an assaulting animal, but no *diyyah* is required for killing a child or insane assailant.

The Ḥanafīs based their ruling for the case of an animal assailant on the Ḥadīth: “An animal that injures a human being thus makes its blood permissible”.<sup>4</sup> In contrast, the actions of a child or an insane person cannot be labeled as a crime or transgression, and thus sanctity of the assailant’s life is not dropped in this case. Thus, we have seen that the Ḥanafī condition of transgression of a punishable crime to permit self-defense fails to hold in such cases.

On the other hand, ‘Abū Yūsuf ruled that the actions of a child or insane person may be considered criminal, since they are required to compensate owners of properties that they destroy. However, he reasoned, punishment for such

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<sup>1</sup>ibid.

<sup>2</sup>Narrated by Al-Nasā’ī, ‘Ishāq ibn Rāhawīh, and Al-Ṭabarānī on the authority of ‘Abdullāh ibn Al-Zubayr, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.347).

<sup>3</sup>Thus, the Ḥanafīs ruled that if an assailant threatens another with a deadly weapon at day or night, or threatens with a stick at night in a town or in the morning outside, then the assaulted party has no liability if he kills the assailant on purpose, c.f. *Majma‘ Al-Damānāt* (p.166).

<sup>4</sup>Narrated by all the major narrators on the authority of ‘Abū Hurayrah (mAbpwh), c.f. Al-Shawkānī (, vol.5, p.234).



transgressors is suspended due to their non-discernment. In contrast, he argued, the actions of animals can never be classified as crimes, and no compensation is required for properties that they destroy.

In summary, 'Abū Ḥanīfa ruled that there is no case for self-defense if assaulted by a child, insane person, or animal. He thus ruled that defense in this case is allowed only on the basis of necessity, and thus compensation is required of the defender. On the other hand, 'Abū Yūsuf and the non-Ḥanafis ruled that there is a case for self-defense against a child or insane assailant. However, he ruled that self-defense against an animal assailant is based on necessity, and thus compensation is due to its owner for destroying it.

The non-Ḥanafis ruled that all of the above-mentioned cases fall under the category of self-defense. In this regard, they ruled that man is required to defend himself and his property against all attacks. Moreover, they ruled that the attack by itself does not legalize killing the assailant, but merely permits prevention of the attack or makes it a requirement. Thus, it is the act of self-defense that permits killing the assailant, and not the assault itself. Hence, they concluded that the assault itself need not be classified as a punishable crime.

In this regard, the Ḥanbalīs ruled<sup>5</sup> that if a person killed an assailant on his life or his life and his family is not liable for compensation. However, they ruled, if the killed assailant had attacked anything else (e.g. property), then the killer is liable for compensation.

The non-Mālikīs ruled that if an assailant bit a person's hand, and his teeth fell when the assaulted person pulled his hand away, the latter is not liable for any compensation. They based this ruling on the Ḥadīth narrated on the authority of 'Umrān ibn Ḥuṣayn that "A man bit the hand of another. When the latter pulled his hand away, the assailant's front teeth fell-off. They took their dispute to the Prophet (bpuh), who said: How could any of you bite his brother's hand the way animals bite each other? You do not deserve any financial compensation".<sup>6</sup> The same Ḥadīth was narrated on the authority of Ya'cālā ibn 'Umayyah.<sup>7</sup>

In contrast, the Mālikīs ruled that the bitten person is liable for compensation in this case, based on the Ḥadīth: "The compensation for each tooth is five camels".<sup>8</sup> On the other hand, Yaḥyā ibn Ya'cūmur said that if Mālik had known of the above mentioned Ḥadīth of 'ibn Ḥuṣayn and Ya'cālā, he would not have ruled against it.<sup>9</sup>

<sup>5</sup> Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.143).

<sup>6</sup> Narrated by 'Aḥmad and the six major narrators with the exception of 'Abū Dāwūd.

<sup>7</sup> Narrated by 'Aḥmad and the six major narrators with the exception of Al-Tirmidhī.

<sup>8</sup> Narrated by 'Abū Dāwūd in *Al-Marāsīl*, and also by Al-Nasā'ī, ibn Kḥuzaymah, 'ibn Al-Jārūd, ibn Hibbān, and 'Aḥmad.

<sup>9</sup> Ibn Qudāmāh (, vol.8, p.333 onwards), Al-Kḥaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.197), Al-Shawkānī (, vol.7, p.25), Al-Sha'arānī ((Shāfi'ī), vol.2, p.173), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.225). In this regard, the Shāfi'īs ruled that it is permissible to hit one who stares into homes, without compensation, unless that person is married and there was nothing forbidden for him to see in the house.



## Defending honor

Jurists agree that a woman is required to defend herself against a rapist's assault, since allowing him to have his way is forbidden.<sup>10</sup> They also ruled that she has the right to kill the rapist if she cannot defend her honor otherwise, in which case she is not liable for any compensation.

Similarly, any man who witnesses a rape attempt is required to prevent the rapist, even if by killing him, provided that he can fight him without endangering his own life. This ruling follows from the fact that honor is made sacred by Allāh, and thus all men have to protect the honor of their family and others alike.

The defender in such cases bears no civil or criminal liability, and thus cannot be required to pay any compensation. This ruling follows from the apparent meaning of the Ḥadīth: "Whoever dies defending his family dies as a martyr".<sup>11</sup> Further proof is provided by the narration of 'Imām 'Aḥmad on the authority of Al-Zuhriy on the authority of 'Ubayd ibn 'Umayr that a man tried to rape a woman, and she hit him with a stone thus killing him. 'Umar then swore that there shall never be any *diyyah* (blood money) for this man. Moreover, jurists argued that fighting an assailant to protect property that is permissible to give away is permissible, and clearly honor that cannot be given is more worthy of protection.

Similarly, the scholars of all four schools ruled<sup>12</sup> that if a man finds another committing adultery with his wife, he is not liable for any compensation if he kills the adulterer. They based this ruling on the narration that 'Umar (mAbpwh) was once eating when a man came running towards him carrying an unsheathed sword covered with blood. The man sat with 'Umar and started eating with him. Then, a group of people came and said: "O ruler of the faithful, this man killed our kinsman with his wife". 'Umar asked the man, and all present agreed that he found the man committing adultery with his wife, and killed him. Thus, 'Umar said, "If you are ever in the same situation again, do the same thing".<sup>13</sup> If the woman was also committing adultery willingly, then she may be killed with no compensation required. However, if a coerced (raped) woman is killed in this context, her killer must be killed in retribution for murder (*qiṣās*).

In such cases, a proof is required as we have seen previously. In this regard, the Ḥanbalīs have two reported opinions regarding the required proof: one is the requirement of having four witnesses, and the other is two witnesses. The first opinion is based on the narration that 'Alī (mAbpwh) was asked regarding a man who found his wife with another and killed them both, in which case 'Alī ruled that the killer should provide four witnesses for his claim, otherwise pay

<sup>10</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.3, p.197; vol.5, p.397), Al-Kāsānī ((Ḥanafī), vol.7, p.93), 'Ibn Ruṣḥd Al-Ḥafīd ((Mālikī), vol.2, p.319), *Majma' Al-Damānāt* (p.203), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.194 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.225), 'Ibn Qudāmah (, vol.8, p.331 onwards), *Kashf Al-'Asrār* (vol.4, p.1520), Al-Dardīr ((Mālikī)A, vol.4, p.357).

<sup>11</sup>Narrations reported previously.

<sup>12</sup>ibid., 'Ibn Qudāmah (, vol.8, p.332).

<sup>13</sup>Narrated by Ḥaṣḥīm on the authority of Muḡhīrah on the authority of 'Ibrāhīm, also narrated by Sa'īd ibn Manṣūr.



the man's family his *diyyah*. This ruling was also supported by the narration on the authority of 'Abū Hurayrah that Sa'ḍ ibn 'Ubadah asked the Messenger of Allāh (pbuh) if he found a man with his wife whether he should try to get four witnesses before killing him, and the Prophet (pbuh) said: "Yes".<sup>14</sup>

The opinion that two witnesses are sufficient in this context is based on the view that only the crime of adultery requires four witnesses. However, to prove the mere fact that the man was with his wife only requires two witnesses.

If the husband cannot provide a proof, and claims that the woman's guardian knew that she committed adultery, then the Ḥanbalīs ruled that the guardian's counter-claim (denial) is accepted if supported by his oath.

### Peeking into a house

If a man peeks into a house without permission, the Shāfi'īs and Ḥanbalīs ruled that the homeowner is not responsible for any criminal or civil compensation if he throws him with a stone or hits him with a stick, thus destroying his eye. In other words, the homeowner in this case pays neither a *diyyah* nor is he liable for physical punishment (*qiṣāṣ*).<sup>15</sup> They based this ruling on a Ḥadīth that explicitly states that there is no punishment for a man who found another peeking into his house without his permission, and threw him with a stone destroying his eye.<sup>16</sup> The Prophet (pbuh) is also narrated to have said that "If a man peeks into the house of a people without their permission, they are thus permitted to take-out his eye".<sup>17</sup> Another Ḥadīth to the same effect states explicitly that the owners of the home in this case are not liable for *diyyah* or *qiṣāṣ*.<sup>18</sup>

On the other hand, if the homeowner throws the peeking transgressor with a very heavy or sharp object and kills him, he would be liable for *qiṣāṣ*, *diyyah*, or if the man's family absolves him. On the other hand, if the peeking transgressor does not leave after being stoned with proportional objects, he may thus be subjected to more forceful treatments, ultimately to the point of killing him, whether he was staring at what he should not see in the road, or in a home. In this regard, the Prophet (pbuh) clarified the wisdom in the prohibition of peeking into homes by saying: "Seeking permission was precisely recommended to protect what can be seen unlawfully".<sup>19</sup>

In this regard the Ḥanafīs and the Mālikīs ruled<sup>20</sup> that the homeowner is

<sup>14</sup>Narrated by Al-Ṭabarānī on the authority of 'Ubadah ibn Al-Ṣāmit, c.f. *Fath Al-Bārī* (vol.12, p.154).

<sup>15</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.197), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.225), 'Ibn Qayyim Al-Jawziyyah ((Ḥanbalī), vol.2, p.336), 'Ibn Qudāmah (, vol.8, p.335).

<sup>16</sup>Narrated by Al-Bukhārī, Muslim, and 'Aḥmad on the authority of 'Abū Hurayrah.

<sup>17</sup>Narrated by 'Aḥmad.

<sup>18</sup>Narrated by 'Aḥmad, Al-Bukhārī, Muslim, and Al-Tirmidhī on the authority of Sahl ibn Sa'ḍ.

<sup>19</sup>Narrated by 'Aḥmad, Al-Bukhārī, Muslim, and Al-Tirmidhī on the authority of Sahl ibn Sa'ḍ.

<sup>20</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.6, p.110), Indian Authors ((Ḥanafī), vol.6, p.7), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.390), 'Ibn Al-Humām ((Ḥanafī), vol.8, p.269), *Majma' Al-Damānāt* (p.169), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), p.351), Al-Sha'arānī ((Shāfi'ī), vol.2,



criminally liable in this case, based on the Ḥadīth: “The punishment for a destroyed eye is half the *diyyah*”.<sup>21</sup> Thus, they ruled that the mere act of looking does not justify physically transgressing against the perpetrator. In this regard, they argued that even being with a man’s wife without fully committing the act of adultery would not justify taking out a man’s eye, and clearly looking is less harmful than such a scenario.

The difference between the two opinions pertains to one who peeked into a house from outside. However, he argued, all jurists agree that if the man put his head inside the house, and the homeowner through him with a stone and took out his eye, then he is not liable for any compensation.

### Defending property

The majority of jurists ruled that defending property (small or large) against unlawful usurpation is permissible, but not required. In this context, if the defender of his property tries to use the least force possible, and only uses more force if necessary, then he should not be liable for any compensation. This ruling is based on the narration on the authority of ‘Abū Hurayrah that a man came to the Messenger of Allāh, and asked him: “What shall I do if a man comes, with the intention of taking my property?”. He (pbuh) said: “Do not give him your property”, or in another narration, “Fight him to defend your property”. The man asked: “What if he fights me?”. He (pbuh) said: “Then fight him”. The man asked: “What if he kills me?”. He (pbuh) said: “Then, you’ll be a martyr”. The man asked: “And what if I killed him?”. He (pbuh) said: “Then, he will be in hell-fire”.<sup>22</sup> Thus, the jurists argued that if the defender eventually has to kill the usurper to prevent him, he would not be liable for any compensation. They also noted that the Ḥadīth was not specific to any specific value of the property, large or small.

In this regard, defense of property (permissible but not required) is distinguished from defense of self and honor (required) by the fact that property may be given away with its owner’s consent. In contrast, life cannot be given away with consent.

Some Mālikīs went further to argue that it is not permissible to defend property of small value. However, we have seen that the above mentioned Ḥadīths apply to all cases of property, irrespective of amount or value. At the other extreme, some jurists ruled that defending property is required. Indeed, we have shown that the majority of Mālikīs ruled that it was required after first warning the transgressor.<sup>23</sup>

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p.159).

<sup>21</sup>Narrated by ‘Abū Dāwūd in *Al-Marāsīl*, and also by Al-Nasā’ī, ibn Khuzaymah, ibn Al-Jārūd, ibn Hibbān and ‘Aḥmad, c.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.244).

<sup>22</sup>Narrated by Muslim and ‘Aḥmad, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.348 onwards). ‘Ibn Taymiyya concluded from this Ḥadīth that the defender should sequentially try to use the least force, and then use more only as necessary, c.f. Al-Shawkānī (, vol.5, p.326).

<sup>23</sup>‘Ibn ‘Ābidīn ((Ḥanafī), vol.4, p.388), Al-Ḥaṭṭāb (1st edition (Mālikī), vol.6, p.323), Al-Dardīr ((Mālikī)A, vol.4, p.357), Al-Shawkānī (, vol.4, p.326), ‘Ibn Qudāmah (, vol.8, p.329



In this context, the Shāfi'īs ruled differently for different types of property.<sup>24</sup> Thus, they ruled that defense of inanimate properties is not required, since it is permissible to allow others to take such properties. On the other hand, the majority of Shāfi'īs ruled that if the transgressor intended to kill the animate property, the owner is thus required to defend its life in the same manner he defends his own life and honor. They also ruled that he is required to defend properties to which the rights of others were attached, e.g. through a pawning or a lease.

On the other hand, if the assault was caused by an inanimate object (e.g. a pot that was falling on his head, and he could only protect himself by breaking it), then he should pay a compensation. This ruling followed from the fact that the pot cannot be deemed an assailant, since it has no will of its own. Thus, the ruling must be made in analogy to a man who eats food owned by another out of necessity, in which case he must pay the owner proper compensation.

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onwards).

<sup>24</sup>Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.2, p.224 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.195 onwards).



## Part XXIII

### Lost and Found (*Al-Luqaṭah* & *Al-Laḳīṭ*)



## Preliminaries

The Arabic term *Al-Luqaṭah* refers to anything that is found and taken, human, animal, or inanimate. The term is used in verse [28:8] to refer to the family of Pharaoh finding and taking-in Moses (pbuh).

The Ḥanafī and other jurists used different terms for what is found and taken: *luqaṭah*, *laqīṭ*, and *ḍallāh*, depending on its nature. The first term usually refers to human infants that are found and taken, the second applies mostly to inanimate properties, and the third applies to animals, and is often subsumed under the more general term *Al-Luqaṭah*. In what follows, we shall the legal status ruling for each of those.



## Chapter 122

# Nature and Rulings for *Al-Laḡṭ*

The Arabic term *laḡṭ* literally refers to anything being lifted off the ground. The term conventionally refers to picking up an infant that was left on the ground by its mother, for fear of the child's illegitimate origins being known, for fear of not being able to provide for it, etc.

The Ḥanafīs ruled that picking up such infants and raising them is one of the most commendable actions, since it preserves life. They further ruled that it is a social religious obligation (*farḍ kifāyah*), i.e. that if nobody else is expected to pick up the infant, it becomes a religious obligation to do so if the infant's life is endangered. Scholars of the other schools also ruled similarly, adding that it becomes a personal religious obligation (*farḍ ʿayn*) if the infant's life is believed to be in danger.

In what follows, we consider some of the specific legal status rulings pertaining to picked-up infants.<sup>1</sup>

### 122.1 Foster parenting

Whoever picks up a deserted infant is most appropriate to raise him. Thus, the finder of such an infant may either volunteer to raise him and bear his expenses, or raise the matter to the ruler to assign a foster family that raises him at the expense of the state treasury designated to serve the public needs of Muslims. On the other hand, if the found infant had some property left with it, then his expenses should be taken out of his property, rather than the public treasury. Thus, the jurists ruled that expenses should only be taken from the

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<sup>1</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.10, p.e09 onwards), Al-Kāsānī ((Ḥanafī), vol.6, p.197 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.4, p.417), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.3, p.297), 'Ibn ʿĀbidīn ((Ḥanafī), vol.3, p.343 onwards), Al-Ṭaḥāwī ((Ḥanafī), p.141), *Majmaʿ Al-Ḍamānāt* (p.211 onwards).



state treasury if the infant has no property, thus establishing his right in public money.<sup>2</sup>

In this regard, if the foster parent spends out of his own property to raise the infant, he may seek compensation for his expenses when he reaches adulthood, if he was commissioned by the judge to raise the child. Otherwise, the foster parent is deemed to have volunteered to raise the child, and hence is not entitled to any compensation from him upon reaching adulthood.

Jurists also ruled that adopted deserted infants, as well as found properties, are considered to be in a possession of trust by the finder.

## 122.2 Guardianship

Guardianship over adopted children and their property is established for the judge, i.e. as pertaining to his education, upbringing, marriage, and financial dealings. This ruling follows from the Ḥadīth: “The ruler is the default guardian for anyone without a guardian”.<sup>3</sup> Thus, the foster parent does not have guardianship rights for marrying the foster child or dealing in his property.

If the ruler marries a picked-up infant after he grows up, his dowry should be paid out of his property if he had any. Otherwise he should pay it out of the state treasury. Similarly, all the expenses of the infant should be borne by the state if he had no property, as ʿUmar and ʿAlī ruled. This ruling follows from the fact that the treasury is responsible for all such expenses of needy individuals. On the other hand, by taking responsibility for such expenses, the state treasury is also entitled to benefits such as the inheritance of such individuals, and financial compensations for any injuries caused to them (*diyyah*).

## 122.3 Presumed religion

Every infant picked-up in the Land of Islam is deemed to be a free Muslim, and a citizen of the Land of Islam, since that is the default status of all human beings. On the other hand, if the infant was found by a Muslim or a non-Muslim in a church or synagogue, or in a village with no Muslim residents, then the child will be considered a non-Muslim. In contrast, if a non-Muslim finds an infant in an Islamic land, he would be deemed Muslim. In other words, the location where the infant is found determines his presumed religion.

<sup>2</sup>Ibn Qudāmah (, vol.5, p.683), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.305), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.421).

<sup>3</sup>Narrated by five companions of the Prophet (pbuh): ʿĀ'ishā, ibn ʿAbbās, ʿAlī, ʿAbdullāh ibn ʿAmr, and Jābir. The Ḥadīth of ʿĀ'ishā was narrated by all major six narrators, Al-Shāfiʿī, and 'Aḥmad: “There is no marriage without a guardian. The marriage of a woman without her guardian’s permission is invalid, invalid, invalid. If a woman has no guardian, then the ruler is the default guardian of anyone without a guardian”. 'ibn Mājah narrated the Ḥadīth on the authority of ibn ʿAbbās as a shortened version, c.f. the authentication of the Ḥadīths of *Tuhfat Al-Fuqahā'* by Dr. Al-Zuhaylī and Prof. Al-Kittānī (vol.3, p.510), Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.3, p.167).



In one opinion reported by 'ibn Samā'ah in *Riwāyat Al-Nawādir*, it was stipulated that the religion of the finder determines the religion of the infant, rather than the location in which he was found. This ruling is based on the juristic rule that possession is a stronger proof than location, e.g. one follows the religion of one's parents and not one's land.

However, Al-Kāsānī ruled that the correct opinion relies on a combination of the religions of the land and the finder. Thus, he ruled that if a Muslim or a non-Muslim finds an infant in the Land of Islam, he would be deemed a Muslim. Finally, if a Muslim, a Christian, or a Jew finds the infant in a non-Muslim house of worship, he would be deemed a Christian or a Jew.<sup>4</sup> Thus, the Ḥanafīs did not consider the place alone, or the finder alone to determine the infant's religion, and considered each case separately.

The Shāfi'īs and Ḥanbalīs ruled that every infant found in the Land of Islam is considered a Muslim, and every infant found in a non-Muslim land with no resident Muslims is considered a non-Muslim. However, the majority ruled that if an infant is found in a non-Muslim land with some Muslim residents, then he is deemed a Muslim, giving priority to the default birth state of Islam.<sup>5</sup> They based that ruling on the Ḥadīth narrated by 'Aḥmad and Al-Dāraqūṭnī: "Islam should always be held supreme".

## 122.4 Lineage considerations

A picked-up infant is deemed to be of unknown lineage. Thus, if a person claims that the infant is his descendant, his claim is accepted and thus establishes a family line. Thus, if the foster parent or another person claims the foster child to be his own, his claim is accepted without requiring material proof, even though the ruling by analogy requires a proof for his claim.

The ruling by analogy is based on the obvious possibility that the claim may be false, thus requiring a proof to establish its validity. However, the ruling in this case is made on the basis of juristic approbation, since the foster parent's claim benefits the picked-up infant in many material and social ways. On the other hand, the establishment of family-lines by such a claim does not negate the infant's presumed state of Islam, since the claim is only accepted in matters that benefit the infant. Thus, if the foster father who claims fatherhood of the infant is a non-Muslim, the child need not be considered a non-Muslim. In this case his religion will be derived from that of the Muslim parent, in analogy to the case where the mother had become a Muslim. Similarly, if two adults claim an infant as their own without proof, then the infant should be given to the Muslim among them to maximize the infant's benefit.

If two adults claim the infant as their own, and they are both free Muslims, then the Ḥanafīs ruled that whichever one of them can describe a birthmark on the infant should be given the infant. They ruled thus by reasoning that knowledge of such a birthmark implies possession, which makes the presumption

<sup>4</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.198).

<sup>5</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.422), 'Ibn Qudāmah (, vol.5, p.681).



of his parenthood more credible. On the other hand, a material proof by one claimed parent is given more weight than the mere knowledge of a birth mark.

If neither one can describe a birthmark or provide any other proof, then both are considered to have an equal claim to his parenthood. In this regard, it is narrated that ʿUmar ruled in a similar situation that the infant is deemed a son to both claiming parents, thus they would inherit him, and he would inherit them.

In this case, the Shāfiʿis ruled that if two adults claim one infant, a lineage tracker is called to assign the infant to one of them, based on physical features. They based this ruling on the fact that assigning the infant to a parent affects all family-lines, and thus the best available methods of investigation should be applied to ensure maximal accuracy.<sup>6</sup>

On the other hand, if an unmarried woman claims the infant as her own, her claim is rejected since that does not give the infant a paternal lineage. On the other hand, a married woman's claim of parenthood is accepted if the husband supports her claim, an expert supports her claim, or two witnesses testify to the same effect.

If two women claim parenthood of a found infant, the one who provides a proof is given priority. If both provide proof, then 'Abū Ḥanīfa ruled that they would both be considered his mothers. In contrast, 'Abū Yūsuf ruled that only one should be the recognized mother, and Muḥammad has two reported opinions, one making both of them his mothers, and one making neither one his parent.

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<sup>6</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.428).



## Chapter 123

# Found Property (*Luqatah*)

### 123.1 Definition and legal status

#### 123.1.1 Definition

The most common term used for found property is *luqatah*. 'ibn Mālik said that it has four pronunciations: *luqāṭah*, *luqṭah*, *luqaṭah*, and *laqaṭ*. Al-Kḥalīl ibn 'Aḥmad derived the morphological implications of its various pronunciations. In this regard, the name is derived from the verb *laqaṭa* (to pick up or take), since human nature dictates taking properties that one finds.

The Ḥanbalī jurist ibn Qudāmah defined *luqatah* as property lost for its owner, found and taken by another. In Ḥanafī sources, *luqatah* is defined as property with an unknown owner that is found, but is not deemed ownerless. Thus, they ruled that such property will have a similar status to the property of an enemy of Islam.

#### 123.1.2 Legal status rulings

##### 1. Preferability

Jurists differed over the preferability of taking lost properties. Thus, the Ḥanafīs and Shāfi'īs ruled that it is preferable to pick-up such lost properties, since a Muslim is required to safeguard the properties of other Muslims. They based this ruling on the verse: “Assist one another in doing good and God-consciousness” [5:2], and the Ḥadīth: “Allāh assists his slave, as long as the slave assists his brother”.<sup>1</sup> Thus, picking-up such property can preserve it and make it possible to return it to its owner. Otherwise, if the property were found by a dishonest person, he may take it for himself. On the other hand, jurists ruled that if the finder of lost property fears that he may not return it to its owner, then it is better not to pick-it-up. If the finder knows that he would never return the property, then it is forbidden for him to pick-it-up. The final ruling is based on

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<sup>1</sup>Narrated by Muslim on the authority of 'Abū Hurayrah, c.f. *Sharḥ Muslim* (vol.17, p.21).



the Ḥadīth narrated by 'Aḥmad on the authority of Jarīr ibn 'Abdillāh: “Only a misguided person would take-in a lost animal, unless he announces his finding”.

The Mālikīs and Ḥanbalīs ruled that picking-up lost properties is reprehensible. They based this ruling on those of ibn 'Umar and ibn 'Abbās. They further reasoned that by picking-up such properties, a man exposes himself to the risk of devouring forbidden property. Moreover, one should be afraid of not exerting enough effort in trying to find the rightful owner and returning the property to him, as well as resisting the temptation to use it unlawfully.<sup>2</sup>

Those are the general rulings of the different schools. Then each school developed its own set of specific rulings. For instance, the Ḥanafīs and Shāfi'īs ruled that picking-up lost property is highly recommended for those who are confident of their honesty and fearful of the possibility that a dishonest person may pick-it-up if he leaves it. On the other hand, if there is no fear that the property may be taken thus, then it is permissible to leave it. At the other extreme, we have seen that it is forbidden to pick-up the property if one is not confident of one's own honesty, based on the Ḥadīth: “Only a misguided person takes-in lost animals”.<sup>3</sup>

## 2. Guaranty

The Ḥanafīs ruled that one who picks-up lost property only guarantees it against his own transgression or refusal to deliver it to its owner if he demands it. This ruling is established if the finder of the property states in front of witnesses that he picked-it up to safeguard it and return it to its owner. Taking a property thus is lawful, based on the Ḥadīth: “Whoever finds lost property, let him ask two men of good character to bear witnesses”.<sup>4</sup> The order in this Ḥadīth makes the two witnesses a requirement. Moreover, if he did not make this declaration before witnesses, he would apparently be taking the property for himself. In this regard, it is sufficient in order to meet this requirement to tell the two witnesses: “If you hear of anyone looking for his lost property, tell him to contact me”.

The possession of the property finder is also a possession of trust if the owner agrees to let him safeguard it for him. On the other hand, if the taker of lost property had no witnesses, and was not authorized by the owner to safeguard it, 'Abū Ḥanīfa and Muḥammad ruled that his possession would be a possession of guaranty if the owner does not believe that he picked-it up to give it to him. This ruling was based on the appearance that he took the property for himself.

<sup>2</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.200), 'Ibn Al-Humām ((Ḥanafī), vol.4, p.423), 'Ibn 'Ābidīn ((Ḥanafī), vol.3, p.406), 'Ibn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.299 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.406), 'Ibn Qudāmah (, vol.5, p.630).

<sup>3</sup>Narrated by Muslim and 'Aḥmad on the authority of Zayd ibn Kḥālīd with the addition “unless he cannot determine its owner”, and also narrated by 'Aḥmad, 'Abū Dāwūd and 'ibn Mājah, c.f. Al-Shawkānī (, vol.5, p.338,344), Al-Ṣan'ānī (2nd printing, vol.3, p.94).

<sup>4</sup>Narrated by 'Aḥmad and 'ibn Mājah on the authority of 'Iyād ibn Ḥimār. Also narrated by 'Abū Dāwūd, Al-Nasā'ī, Al-Bayhaqī, and Al-Tabarānī, and deemed valid by ibn Khuzaymah, ibn Al-Jārūd and ibn Ḥibbān, c.f. Al-Shawkānī (, vol.5, p.338), Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.3, p.466), Al-Ṣan'ānī (2nd printing, vol.3, p.96), 'Ibn Daqīq Al-'Id (, p.370).



In this regard, 'Abū Yūsuf, the Mālikīs, Shāfi'īs, and Ḥanbalīs ruled that found and picked-up properties are thus held in a possession of trust. Thus, they ruled that seeking witnesses is recommended, but not required. They based this ruling on the view that picked-up property is tantamount to a deposit, and thus its possession of trust cannot become a possession of guaranty merely because of lack of witnesses. They based this classification on the Ḥadīth of Sulaymān ibn Bilāl and others: "Give it to its owner if he comes, otherwise, hold it as a deposit".<sup>5</sup>

They based their ruling that witnesses were not necessary on the narration that the Prophet (pbuh) ordered Zayd ibn K̥halid and 'Ubay ibn Ka'b to try to find the owner, but did not order them to have witnesses.<sup>6</sup> In this regard, if witnesses were required, the Prophet (pbuh) would have told his companions. Therefore, the mention of witnesses in the Ḥadīth of 'Iyāḍ, used by the Ḥanafīs as described above, is inferred to make it preferable to have witnesses, but not a requirement.<sup>7</sup>

This difference in opinion results in the following differences in rulings:

- 'Abū Ḥanīfa and Muḥammad ruled that there is no guaranty if a person took a lost property, and then returned it to where he found it. They based this ruling on the view that he merely took it to safeguard it for its owner, and thus when he returned it, he voided his volunteering that service, as though he had never taken it. In this case, they ruled that if the property was later lost, the volunteer is not liable for compensation if the owner believed that he had originally taken it for safekeeping, or if he had declared that that was his intention before witnesses. On the other hand, if he returned the property to where he found it and it was subsequently lost, and he had no witnesses, then they ruled that he must compensate the owner.
- 'Abū Yūsuf ruled that the volunteer is not responsible for compensation, whether or not he had witnesses. Thus, he ruled that the volunteer's claim, that he picked-up the property to safeguard it for its owner is, accepted if supported by his oath.
- Mālik ruled that if the volunteer returned the property to where he found it, he would not be liable for compensation. He based this ruling on the narration that 'Umar told a man who found a donkey to take it back to where he found it. In contrast, the majority of Mālikīs ruled that once a

<sup>5</sup>Narrated by Muslim, c.f. Al-Shawkānī (, ibid., p.341), 'Ibn Daqīq Al-ʿĪd (, [.371], *Sharḥ Muslim* (vol.12, p.25).

<sup>6</sup>The Ḥadīth of Zayd was narrated by Al-Bukhārī, Muslim, and 'Aḥmad. The other Ḥadīth was narrated by Muslim, 'Aḥmad, and Al-Tirmidhī, c.f. Al-Shawkānī (, ibid., p.338).

<sup>7</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.12), 'Ibn Al-Humām ((Ḥanafī), ibid.), Al-Kāsānī ((Ḥanafī), vol.6, p.201), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.2, p.301), *Majmaʿ Al-Ḍamānāt* (p.209 onwards), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.303 onwards), Al-Dardīr ((Mālikī)A, vol.4, p.121), 'Ibn Juzayy ((Mālikī), p.342), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.407), 'Ibn Qudāmah (, vol.5, pp.744,647), 'Ibn Rajab (1st edition (Ḥanbalī), p.53).



volunteer picks-up a property for safeguarding, he would guarantee it if he puts it back where he found it, or anywhere else.

- The Shāfiʿīs and Ḥanbalīs ruled in this case that once a volunteer picks-up a property for safeguarding, as a trust, he is required to protect it. Thus, if he puts it back where he found it, and it is subsequently lost, he must compensate the owner, in analogy to a depositary who does not take precautions to protect a deposit.
- Similarly, the majority of jurists ruled that if a person picks-up lost property and gives it to another for safekeeping without the judge's permission, since picking-it-up obliges him to safeguard it himself.
- If the lost property perished in the possession of the one who picked it up, then he is not liable for compensation if he had announced that he found lost property. If he had not made the announcement in front of witnesses, then we have seen that 'Abū Ḥanīfa and Muḥammad ruled that he is liable for compensation. In contrast, we have seen that 'Abū Yūsuf ruled that that his claim of taking the property for safeguarding is accepted subject to his oath, and thus he would not be liable for compensation.
- If the taker of a lost property admits that he took it for himself, then he can only be absolved of his guaranty by returning the property to its owner. This ruling follows from the fact that he thus usurped the property, and thus must return it to its owner.<sup>8</sup> This ruling is based on the Ḥadīth: "Every hand is responsible for what it took, until it returns it to its owner".<sup>9</sup>

## 123.2 Types of *luqaṭah*, and modes of behavior

### 123.2.1 Types of *luqaṭah*

There are two main types of *luqaṭah*, depending on whether the found property is an animal, or an inanimate object.

The Ḥanafīs and most of the Shāfiʿīs ruled that picking-up lost animals is permissible for safeguarding. In contrast, Mālik and 'Aḥmad ruled that picking-up lost animals or inanimate property is reprehensible.<sup>10</sup> They based that latter ruling on the Ḥadīth narrated by the six major compilers on the authority of

<sup>8</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.201), Al-Sarakhsī (1st edition (Ḥanafī), vol.11, pp.11,13), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.304), 'Ibn Qudāmāh (, vol.5, p.694), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.411).

<sup>9</sup>Narrated by 'Aḥmad and the four authors of *Sunan* on the authority of Al-Ḥasan ibn Samurah, and deemed valid by Al-Ḥākim, c.f. Al-Shawkānī (, vol.5, p.298), Al-Ḥafīz Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.167).

<sup>10</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.11), Al-Kāsānī ((Ḥanafī), vol.6, p.200), 'Ibn Al-Humām ((Ḥanafī), vol.4, p.428), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.3, p.305), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.299 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.409), 'Ibn Qudāmāh (, vol.5, p.630 onwards).



Zayd ibn Khālīd Al-Juhanī that the Prophet (pbuh) was asked about picking-up lost gold and silver. He (pbuh) said: “Identify it and keep it separate from other properties (lit. know its sack and rope holding the sack closed), and announce for one year that you have found it. If nobody claims it, and you cannot find its owner, then you may either spend it and guarantee its value for the owner, or keep it as a deposit. If the owner ever comes to claim it, you must give it to him”. In another Ḥadīth, a man asked him (pbuh) about lost camels, and he (pbuh) said: “Leave it alone, for it has its own shoes (its hoofs), and its own water in its belly. It can drink and eat whatever it finds, so leave it free until its owner finds it”. On the other hand, when he (pbuh) was asked about a lost sheep, he (pbuh) said: “Take it, for either you take it, your brother takes it, or the wolf will take it”.<sup>11</sup> Thus, we conclude that picking up lost camels is not permitted, while picking up other properties is permissible.

‘Abū Dāwūd, ‘Aḥmad, and ‘ibn Mājah narrated on the authority of Jarīr ibn ‘Abdillāh that he heard the Prophet (pbuh) say: “Only a misguided person would take-in a stray or lost animal”.<sup>12</sup> It was also narrated that the Prophet (pbuh) said: “Taking-in a lost animal can lead a Muslim to the hell-fire”, meaning if he takes it for himself.<sup>13</sup> Finally, it was narrated by Muslim, ‘Aḥmad, and Al-Tirmidhī on the authority of ‘Ubay ibn Ka‘b that the Prophet (pbuh) said: “Announce finding the lost property. If someone comes who correctly identifies its sack and rope, then give it to him. Otherwise, use it”.<sup>14</sup>

Those who ruled for taking lost property for safeguarding argued against that opposing Ḥadīths by saying that they applied to a time in the past, when most people were honest. However, they argued, it is better in current times to legalize taking property for safekeeping, given the large number of dishonest people who can take it.

For the one category of lost properties of pilgrims, all jurists are in agreement that it is not permissible to pick-up such properties, based on the Prophet’s (pbuh) explicit prohibition of doing so.<sup>15</sup> The jurists are also in agreement that lost properties dropped in Makkah should not be picked up, based on the statement the Prophet (pbuh) made on the day of its conquest: “Any dropped or lost property in this city may only be picked up by one who aims to find its owner”.<sup>16</sup>

<sup>11</sup> Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.468), Al-Shawkānī (, vol.5, p.338), *Sharḥ Muslim* (vol.12, p.20).

<sup>12</sup> Narrated by ‘Aḥmad, ‘Abū Dāwūd and ‘ibn Mājah, c.f. Al-Shawkānī (, ibid., p.344), Al-Ṣan‘ānī (2nd printing, vol.3, p.94).

<sup>13</sup> Narrated by Al-Ṭabarānī in his *Kabīr* on the authority of ‘Ismah, with a weak chain of narration including ‘Aḥmad ibn Rāshid. It was also narrated by ‘Aḥmad, ‘ibn Mājah, Al-Ṭahāwī, ibn Hibbān, and others on the authority of ‘Abdullāh ibn Al-Shikḥkhīr, c.f. Al-Haythamī (, vol.4, p.167), Al-Ṣan‘ānī (2nd printing, vol.3, p.94).

<sup>14</sup> Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.3, p.467), Al-Shawkānī (, vol.5, p.339).

<sup>15</sup> Narrated by ‘Aḥmad and Muslim on the authority of ‘Abduraḥman ibn ‘Uṭhmān, c.f. *Sharḥ Muslim* (vol.12, p.28), Al-Ṣan‘ānī (2nd printing, vol.3, p.96).

<sup>16</sup> Narrated by Al-Bukḥārī and Muslim on the authority of ‘ibn ‘Abbās and ‘Abū Hurayrah, with slight variation in the wording, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.3, p.467), Al-Shawkānī (, vol.5, p.24).



### 123.2.2 What to do with *luqaṭah*

Anyone who picks-up a dropped or lost property must announce that he found it, and thus seek its owner. This ruling follows from the narration of Al-Bukhārī and Muslim on the authority of Zayd ibn Khālīd Al-Juhānī, and other Ḥadīth wherein the Prophet (pbuh) said that one who picks-up a property should announce it for a year.<sup>17</sup>

In this regard, jurists discussed at length the nature of announcement of the found property and seeking its owner, the period for such activities, the place announcement should be made, responsibility for expenses of the search, expenses of a lost and found animal, the condition of returning lost and found property to its owner, and the legal status ruling for owning the found property.

#### 1. Methods of announcement

The taker of lost property should openly announce having found it in public places, mentioning its genus or some of its characteristics. However, he should not give a full description, so that the detailed descriptions can be provided as proof of a true owner.

The non-Shāfiʿīs ruled that the taker of a lost property must announce having found it. They based this ruling on the above mentioned Ḥadīth of Zayd ibn Khālīd, where the order to announce having found it for a year, renders it a requirement. In this regard, scholars of Islamic legal theory agree that the apparent implication of any order in a Ḥadīth is that the ordered action is a requirement.

In contrast, most Shāfiʿīs ruled that the taker of lost property is not required to announce having found it, as long as he takes it to safeguard it for its owner. They ruled thus by reasoning that the Law made announcement a requirement if the taker of the property intended to own it if its owner was not found. However, the official Shāfiʿī opinion is in agreement with the other three schools: that announcement is a requirement.

In this regard, the taker of lost property may announce having found it himself, or he may have another person make the announcement in his place.<sup>18</sup>

#### 2. Period of announcement

Jurists are in agreement that if a person finds a stray sheep in a desolate place, he may eat it. This ruling follows directly from the above mentioned Ḥadīth: “It is yours, your brother’s, or the wolf’s”. However, they differed over whether or not he is liable to compensate the owner for its value. The majority of

<sup>17</sup>Narrated by Al-Bazzār in his *Musnad*, and Al-Dāraqūṭnī in his *Sunan* on the authority of ‘Abū Hurayrah, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.3, p.466), Al-Shawkānī (, vol.5, p.338), Al-Ṣanʿānī (2nd printing, vol.3, p.94), *Sharḥ Muslim* (vol.12, p.26).

<sup>18</sup>‘Ibn ʿAbidīn ((Ḥanafī), vol.3, p.350), ‘Ibn Al-Humām ((Ḥanafī), vol.4, p.426), Al-Dardīr ((Mālikī)A, vol.4, p.120), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, pp.411,413), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.429), ‘Ibn Qudāmah (, vol.5, pp.631,633 onwards), Al-Shawkānī (, vol.5, p.340), Al-Ramlī ((Shāfiʿī), vol.4, p.362).



jurists ruled in this case that he must compensate the owner, since a Muslim's property cannot be taken without his consent.<sup>19</sup> In contrast, the more accepted opinion of Mālik in this case is that the Ḥadīth does not explicitly suggest that compensation is required.

For properties other than lost sheep, jurists agreed that announcement for one year is required for significant properties, as per the Ḥadīth reported above. In this regard, the Ḥadīth of 'Ubayy narrated by Al-Bukhārī and Muslim that lists an announcement period of three years, four years, or ten years, is rejected based on errors of some of the compilers, according to the research of 'ibn Al-Jawziyy. Another interpretation is that the extra period may be appropriate for individuals who wish to err on the side of caution before dealing in lost and found property.<sup>20</sup>

The Shāfi'is and most of the Mālikīs ruled that insignificant property should be advertised for any period sufficiently long to assume that the one who lost it would have given up looking for it, even if that is less than one year. In this regard, insignificant property was defined by 'Ā'isha (mAbpwh) to be anything less than a *Dirham*, the majority of jurists defined it to be anything less than one-quarter of a *Dinār*, and the Ḥanafīs defined it to be anything less than ten *Dirhams*.

In contrast, Al-Ṭaḥāwī reported that the accepted opinion among the Ḥanafīs is that announcement for a year is required regardless of the property's value. The Ḥanbalīs also adopted the same opinion as the Ḥanafīs in this regard.<sup>21</sup>

On the other hand, all jurists agree that trivial properties (e.g. a single date) may be taken and used, since the Prophet (pbuh) did not deny for one who found a date to eat it, and he (pbuh) once saw a date and said: "If it were not for fear that it was part of a charitable payment, I would have eaten it".<sup>22</sup>

Moreover, we note that the full period of announcement is only stipulated for non-perishable properties. However, the Shāfi'is ruled that perishable properties should be spent, consumed, or given to charity. In this regard, the Shāfi'is ruled that the finder of such property should sell it and own the price only after the announcement period elapses. Alternatively, they ruled, he may eat the found property immediately, and be liable for its value.

<sup>19</sup>Ḥadīths to this effect were narrated by Al-Ḥakīm, ibn Hibbān, 'Aḥmad, and Al-Bazzāar on the authority of 'Abū Ḥumayd Al-Sā'idi. It was also narrated by 'Aḥmad on the authority of 'Amr ibn Yathribī, c.f. Al-Ṣan'ānī (2nd printing, vol.3, p.60 onwards), Al-Haythamī (, vol.4, p.171).

<sup>20</sup>Al-Ḥafīẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.3, p.467), Al-Shawkānī (, vol.5, p.340 onwards).

<sup>21</sup>'Ibn Rushd Al-Hafid ((Mālikī), vol.2, pp.301,303), Al-Dardīr ((Mālikī)A, vol.4, p.120), 'Ibn Qudāmah (, vol.5, pp.632,634), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.430), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.415), Al-Kāsānī ((Ḥanafī), vol.6, p.202), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.3, p.302 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.4, p.434 onwards), Al-Ṭaḥāwī ((Ḥanafī), p.139).

<sup>22</sup>Those two Ḥadīths were reported in 'Ibn Qudāmah (, vol.5, p.634). The second one was narrated by Al-Bukhārī and Muslim on the authority of Anas, c.f. Al-Ṣan'ānī (2nd printing, vol.3, p.93), 'Ibn Daqīq Al-'Id (, p.373).



### 3. Location of announcement

Announcement of finding a lost property should be made in all public places of congregation, to seek maximal dissemination of information, and maximal exposure. However, the owner of a lost property should not go looking for it in the Masjid, since the Prophet (pbuh) said: “If you hear a man looking for his lost animal in the Masjid; say: May Allāh never bring it back to him. For Masjids were not built for that purpose”.<sup>23</sup> However, announcement at the doors of Masjids is allowed, as ‘Umar ordered the finder of lost property to do so. Moreover, the Shāfi‘is made an exception for the Masjid Al-Ḥarām, wherein they allowed the announcement of lost and found, since anyone who picks up lost properties there clearly has no intention of owning it.

In this regard, there is no harm in using the loudspeakers of Masjids to announce lost and found in times other than prayer times, due to the vast areas of modern cities. He also reasoned that advertisement in newspapers and posting signs, and other modern methods of information dissemination should be used.

The Shāfi‘is explained how advertisement should be done during the specified one year. Thus, they ruled that the finder of lost property should announce it twice a day (beginning and end) in the beginning, then once a day, then once a week, and then once a month as the year draws to an end.<sup>24</sup>

### 4. Announcement and property expenses

The Ḥanafīs and Ḥanbalīs ruled that all costs of announcement (e.g. newspaper advertisement, or the wages of an announcer) are to be borne by the finder of lost property. They based this ruling on the fact that the finder is responsible to make the announcement, and thus must bear its expenses just as he bears the expenses of his own time, whether or not he aims to own the found property.

The Mālikīs ruled that if the finder of lost property spent out of his own property to announce the found property, the owner will be given the option of compensating him for such expenses, or leaving the property with the finder in exchange for the expenses he spent.<sup>25</sup>

In contrast, the Shāfi‘is ruled that if the finder took the property with the intention of safeguarding it for the owner, he should not bear the expenses of announcement, and should either take the expenses from the state treasury by court order, or borrow the expenses to be repaid by the owner.<sup>26</sup> On the other hand, they ruled that if the finder took the property with the intent of ultimately owning it, then he must bear responsibility for the costs of announcement,

<sup>23</sup>Narrated by Muslim and ‘Abū Dāwūd on the authority of ‘Abū Hurayrah. Also narrated by Al-Bazzār on the authorities of Sa‘d ibn ‘Abī Waqqās, ‘Anas ibn Mālik, and ibn Mas‘ūd, c.f. Al-Haythamī (, vol.4, p.170), *Al-Tāj* (vol.1, p.214).

<sup>24</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.202), ‘Ibn ‘Ābidīn ((Ḥanafī), vol.3, p.350), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.413), ‘Ibn Qudāmah (, vol.5, p.633), Al-Dardīr ((Mālikī)A, vol.4, p.120), Al-Shawkānī (, vol.5, p.340).

<sup>25</sup>Al-Dardīr ((Mālikī)A, vol.4, p.123).

<sup>26</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.413 onwards).



whether or not he actually owns it in the end. This seems to be the most reasonable opinion.

With regards to costs of sustaining found animals, the *Malikīs* ruled that the finder may seek compensation for such expenses from the owner. In contrast, the *Shāfi'īs* and *Ḥanbalīs* ruled that the finder of a property is thus volunteering to safeguard it, and hence may not seek compensation from the owner. However, the *Shāfi'īs* allowed the finder to seek a ruler's permission, or find witnesses, if he wishes to be compensated for such expenses.

The *Ḥanafīs* also ruled thus that if the finder spends out of his own property to sustain the found property without taking the ruler's permission, then he is considered a volunteer, and is not entitled to any compensation from the owner. They based this ruling on the view that the finder has no guardianship over the property's owner which entitles him to establishing a debt on him. On the other hand, if he seeks and receives the ruler's permission, then whatever he spends can be established as a debt on the owner. In this regard, the judge should consider if the found animal has usufruct that can be leased. Then, if it is possible, he should lease the animal, and use its rent to cover its expenses. In this case, the lease is allowed since it benefits the owner [by keeping his animal alive]. On the other hand, if the animal has no lease value, and if the judge fears that its expenses may exceed its market value, he may order the finder to sell the animal and safeguard its price.

Finally, if the judge finds that the most advantageous arrangement is to cover the animal's expense and not sell it, then he may permit the finder to spend on the animal's sustenance and maintenance, and establish the expenses as a debt on the owner. Then when the owner comes to claim the animal, the finder may keep the animal until the owner reimburses him for his expenses. If the latter refuses to pay, the judge may then sell the animal to reimburse the finder for his expenses out of its price.<sup>27</sup>

## 5. Returning the property to its owner

Jurists of all schools are in agreement that the owner of a property must be able to name some features that distinguish it, have material proof of ownership, or provide two witnesses to testify that it belongs to him. If the owner provides such a proof or testimony, then the finder may give him the property, and if he wishes, he may take a reward for having found it. Thus, the finder is allowed to return the property if the claimed owner merely mentions a distinguishing sign, since this has been explicitly legalized by the *Ḥadīth*.

On the other hand, jurists differed over whether or not the finder is obliged to return the property if the owner merely mentions a distinguishing sign or characteristic of the property, without presenting a material proof of owner-

<sup>27</sup> *Tbn Rushd Al-Ḥafid* ((*Mālikī*), vol.2, p.304), *Al-Khaṭīb Al-Shirbīnī* ((*Shāfi'ī*), vol.2, p.410), *Al-Kāsānī* ((*Ḥanafī*), vol.6, p.203), *Tbn Al-Humām* ((*Ḥanafī*), vol.4, p.428 onwards), *Al-Zayla'ī* ((*Ḥanafī Jurisprudence*), vol.3, p.305), *'Abū-'Ishāq Al-Shīrāzī* ((*Shāfi'ī*), vol.1, p.432), *Al-Sarakḥsī* (1st edition (*Ḥanafī*), vol.11, p.9), *Tbn Qudāmāh* (, vol.5, p.633 onwards).



ship:<sup>28</sup>

- The Ḥanafīs and Shāfiʿīs ruled that the finder is not obliged to give the property to its claimed owner, unless the latter can provide a material proof. This ruling follows from the fact that the latter is a claimer, and thus his claim requires a proof just like any other claim. Proof for this principle is provided by the Ḥadīth: “If all claims were accepted, some people would falsely claim the property and blood of others. Thus, a claimant needs to provide a material proof, otherwise the denier’s counterclaim is accepted if supported by his oath”.<sup>29</sup>

Moreover, since found property belongs to another, its delivery is only required if the claimant can present more proof than a mere description of the property, in analogy to the rule for deposits.

However, the Ḥanafīs ruled that the finder is allowed to give the property to a claimant who can provide a detailed description. The Shāfiʿīs ruled similarly if the finder has sufficient reason to believe the claimant. Both of those rulings are based on the Ḥadīth, wherein the Prophet (pbuh) said: “Then if the owner of the property comes, and accurately describes the sack, its rope, and its content, then give it to him. Otherwise, it becomes yours”.

- The Mālikīs and Ḥanbalīs ruled that the finder is required to give the property to the claimed owner if he gave the above mentioned detailed description, whether or not the finder believes him. Thus, they reasoned that the apparent meaning of above mentioned Ḥadīth obliges the finder to give the property based on description, regardless of the availability of material proof, or his own suspicions.

In this regard, we recall that the above mentioned Ḥadīth of Zayd: “Know its sack and rope, then announce having found it for one year. If it is not identified within that time, you may spend it. And, if someone ever comes demanding it, then give it to him”, meaning demanding it with its specific description. Note that the Ḥadīth does not mention material proofs anywhere. Were such proofs required, it would not be permissible to violate that requirement, and the order would not have been issued to give the property back without its satisfaction. Moreover, providing material proof for ownership of a lost property can be quite difficult, since properties are often lost due to forgetfulness. In this regard, the Ḥadīth

<sup>28</sup> Ibn Al-Humām ((Ḥanafī), vol.4, p.431), Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.8), Al-Kāsānī ((Ḥanafī), vol.6, p.202), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.3, p.306), Ibn ʿAbidīn ((Ḥanafī), vol.3, p.353), Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.302), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.416), Abū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.431), Ibn Qudāmah (, vol.5, p.644 onwards).

<sup>29</sup> This is a Ḥadīth Ḥasan, narrated by Al-Bayhaqī and ʿAḥmad in this form, and narrated with slightly different language in Al-Bukhārī and Muslim on the authority of Ibn ʿAbbās, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.95), Al-Shawkānī (, vol.8, p.305), Al-Ṣanʿānī (2nd printing, vol.4, p.132), Ibn Daqīq Al-ʿId (, p.521), *Sharḥ Muslim* (vol.12, p.2).



stating: “The claimant must provide proof” applies only if there is a denier of that claim. However, there is no denier in the context of returning lost property. This seems to be the most appropriate ruling in this case.

## 6. Owning the found property

Jurists differed in opinion regarding whether or not all finders of lost property would own it after one year of announcements, or whether only the poor finders would own it thus:

- The Ḥanafis ruled<sup>30</sup> that a rich finder of property is not permitted to benefit from it, but must give it in charity to poor family members (including parents, a wife, or offspring) or others. They based this ruling on the view that the property belongs to another, and thus may not be used without its owner’s consent. For proof, they cited the verses: “And do not devour your wealth among yourself unlawfully” [2:188], and “And do not transgress, for Allāh loves not the transgressors” [2:190], as well as the Ḥadīth: “The property of a Muslim is not permissible for another without his consent”.

Moreover, they cited an explicit Ḥadīth on the authority of ‘Abū Hurayrah: “Found property is not permissible. Thus, whoever finds lost property should announce it for a year. Then, if its owner comes, he should give it to him. If the owner does not come, then the property should be given away in charity”.<sup>31</sup> Finally, they relied on the Ḥadīth of ‘iyād ibn Ḥimār Al-Mujāshī‘iy: “Whoever finds lost property should ask one or two individuals of good characters to bear witness, and he should not hide it. Then, if he finds its owner, he should return it to him, otherwise, it is a property of Allāh to be given to whomsoever he wishes”.

On the other hand, they ruled that if the finder is poor, then he may use the found property. They made this ruling on the view that being poor, he is himself eligible to receive the property in charity, and thus the Ḥadīth: “Let him give it away in charity” is not violated.

In either case, if the owner is found after the property was used or given away in charity, he has an option of (i) letting the charity stand, getting full religious credit for it, (ii) seeking compensation from the finder, or (iii) taking the property back from the poor who received it in charity. In this regard, whomever the owner takes compensation from has no recourse to seek compensation from the other.

- The non-Ḥanafī jurists ruled that the finder of a lost property may own it whether he is poor or rich, and thus it becomes part of his property. They

<sup>30</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.4 onwards), ‘Ibn Al-Humām ((Ḥanafī), vol.4, p.432 onwards), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.3, p.307), Al-Kāsānī ((Ḥanafī), vol.6, p.202), ‘Ibn ‘Abidīn ((Ḥanafī), vol.3, p.351).

<sup>31</sup>Narrated by Al-Bazzār and Al-Dāraqutnī, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Ḥadīth), vol.3, p.466). Also narrated by Al-Ṭabarānī on the authority of Ya‘lā ibn Murrah, with a weak chain of narrators and a slightly different wording, c.f. Al-Shawkānī (, vol.5, p.337).



based this ruling on the narration that a number of companions of the Prophet (pbuh), including ʿUmar, ibn Masʿūd, ʿĀʾisha, and ibn ʿUmar approves such ownership. Moreover, they relied on the Ḥadīth of Zayd ibn K̥hālīd: “Then, if the property is not claimed, you may spend it”, or “you may do with it as you please”. This is a valid Ḥadīth, and its narrations on the authority of ʿUbay ibn Kaʿb include the wording “you may spend it” and “you may use or benefit from it”.

They deemed the Ḥadīth on the authority of ʿAbū Hurayra, on which the Ḥanafīs relied, not to be authentic. Moreover, they countered the Ḥanafī understanding of the Ḥadīth of ʿIyāḍ, that whatever is characterized as the property of Allāh may only be spent in charity, by saying that all property belongs to Allāh, since He (swt) said: “And give them some of the property of Allāh which He has given you” [24:33].

In this regard, the non-Ḥanafīs differed regarding the nature of ownership, thus:

- The Ḥanbalīs ruled that found property becomes part of the finder’s property at the end of the announcement period, and has the same legal status as inheritance. They based this ruling on the Ḥadīth: “Otherwise, it is part of your property”, and he (pbuh) said: “then spend it”. Thus, the finder is granted full ownership of the property after the announcement period, otherwise the Prophet (pbuh) would have specified the limits of his ownership.
- The Mālikīs ruled that the finder must renew his intent to own the property, otherwise the transfer of ownership would be incomplete since no offer was made by another person.
- The Shāfiʿīs ruled that the finder of lost property must make a verbal declaration of owning the property he found. They based this ruling on the view that this is entitlement to own in an exchange, and thus requires a declaration of the will to become an owner, in analogy to the exercise of preemption rights.

All jurists, with the exception of the Zāhirīs ruled that if the finder of lost property ate it, he is liable for compensating its owner.<sup>32</sup>

### Lost and found in the Ḥaram

The majority of jurists ruled that the above mentioned rulings apply to lost property found in Makkah or elsewhere. They based this ruling on the view that lost properties are taken into a possession of trust, and thus its legal status is not affected by the sacredness of the time or the place, in analogy to deposits. Moreover, they argued the Ḥadīths related to lost and found property did not distinguish between times and places.

<sup>32</sup> Al-Dardīr ((Mālikī)A, vol.4, p.121), ʿIbn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.301), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.415), ʿAbū-ʿIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.430), ʿIbn Qudāmah (, vol.5, p.636 onwards).



In this regard, the Ḥadīth that explicitly mentions properties lost and found in Makkah aimed to dispel any misconceptions that lost and found properties in Makkah need not be announced, thinking wrongly that there is no benefit in making such announcements since most of the dwellers there are travelers who are likely to have left.<sup>33</sup>

On the other hand, the majority of Shāfi'īs ruled that lost and found properties in the Masjid Al-Ḥarām in Makkah must be announced forever, since nobody is entitled to claim ownership of such properties other than their original owners. They based this ruling on the Ḥadīth narrated by Al-Bukhārī and Muslim: "This city was made sacred by Allāh. Thus, the only one allowed to pick-up property in it is one who seeks to find its owner". Another narration in Al-Bukhārī stated the Ḥadīth as: "Picking up lost property in the Ḥaram is only allowed for those seeking to find its owner". Thus, the Prophet (pbuh) did distinguish between properties lost and found there and those lost and found elsewhere. Moreover, since the announcement and attempt to find the owner is not timed in this Ḥadīth, it is clear that the requirement in this case is to make the announcement perpetual, otherwise there would be no reason for making a special statement regarding lost and found in the Ḥaram. In this regard, people may leave the Ḥaram, but they tend to visit repeatedly, and they would thus find their property safeguarded for them when they come back.

This is not a unique distinction for the Ḥaram. For instance, it is well known that compensation for causing bodily harm in it (*diyyah*) is multiplied manifold.

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<sup>33</sup>Ibn Al-Humām ((Ḥanafī), vol.4, p.430), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.3, p.301), Al-Kāsānī ((Ḥanafī), vol.6, p.202), Al-Dardīr ((Mālikī)A, vol.4, p.121), 'Ibn Qudāmāh (, vol.5, p.642).



**Part XXIV**

**Missing Persons**



## Chapter 124

# Missing Persons

This short part discusses the meaning of missing persons, how to classify a lost person, and how the judge should treat his property and family, or declare him dead, etc.<sup>1</sup>

### 124.1 Definition

A missing person is one who has been away from his home for a long time, without his whereabouts being known. A person is only announced legally missing if he has been gone sufficiently long that it is not known to be dead or alive.

### 124.2 Declaration of life or death

A missing person is legally considered alive as far as he is concerned, but dead as far as others are concerned. Thus, the Ḥanafīs establish for him all the negative rights, and none of the positive. Hence, as far as he is concerned, his property cannot be inherited, and his wife cannot remarry, as if he is alive. On the other hand, as far as others are concerned, he cannot inherit any of his relatives or anyone who named him in his will, as if he is dead. In such cases, his share of the inheritance is suspended pending knowledge of whether he is alive or dead.

The Ḥanafīs and Shāfiʿīs also ruled that the wife of a missing person is not allowed to void the marriage. Thus, they ruled that she must wait, and only be allowed to remarry if she knows that her husband has died.

In contrast, ʾImām Mālik and ʾImām ʾAḥmad ruled that after four years of absence, a judge may separate a woman from her absent husband. In this case, she must wait the months of ʿiddah required for a widow, and then she is

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<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.196), ʾIbn Al-Humām ((Ḥanafī), vol.4, p.440), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.3, p.310), ʾIbn ʿĀbidīn ((Ḥanafī), vol.3, p.360), Al-Dardīr ((Mālikī)B, fol.2, p.694 onwards), ʾAbū-ʾIshāq Al-Shīrāzī ((Shāfiʿī), vol.2, p.146), Al-Buhūtī (3rd printing (Ḥanbalī), vol.5, p.487 onwards).



allowed to marry whomsoever she wishes. They based this ruling on a report that ʿUmar (mAbpwh) ruled thus for missing husbands.

### 124.3 Guardianship rights for the judge

The Ḥanafīs listed the following rights over the property and family of a missing person:

1. The judge must appoint a trustworthy person to safeguard the absent person's property, tend to it, invest it, and collect its revenues and legal entitlements. Thus, this trustee is appointed in analogy to the trustee over the property of a young boy or an insane person.
2. The judge should sell all the perishable properties of the absent person, and safeguard the price collected thereof, since selling such properties is a mean of safeguarding them. The deposits of the missing person should be kept with the depositary for safeguarding, since the depositary acts as the missing person's agent in safeguarding his property.
3. If it is known that the missing person's marriage was not dissolved, then some of his property should be spent on his wife. Similarly, some of his property should be spent on his small children, or older poor offspring.

The judge may only spend monetary property and food and clothes on the missing person's family. However, the judge may not spend his tradable goods and real estate on the family, since spending out of such properties is only possible if they are sold. In this regard, the judge is not allowed to sell real estate and tradable goods on behalf the missing person. However, the missing person's father may sell his tradable properties on his behalf, since a father has full guardianship over his son's financial dealings, while the judge does not. As for the real estate holdings of a missing person, the father may only sell such properties with the judge's permission.

### 124.4 Declaration of death

If the absent person is gone sufficiently long that it is very unlikely to be alive at his age, he may be declared dead. Thus, his wives will be separated from him, and his living heirs inherit his property. Moreover, he would thus not inherit from anyone.

In this regard, there is no specific age that can be used universally as a demarcation for declaring a missing person dead. Rather, life expectancy of the missing person should be estimated based on the life expectancy of those of his generation. In jurisprudence books, Al-Ḥasan ibn Ziyād reported that 'Abū Ḥanīfa considered maximum life expectancy to be 120 years, but 90 years seems more reasonable and less stringent.



Part XXV

Racing and Athletic  
Competition



## Chapter 125

# Racing & Competition (*Al-Sabq*)

### 125.1 Definition and legality

The term *al-sabq* refers to racing in which the winner wins some prize. The derivative term *al-sibāq* refers to horse or camel racing between men. Such racing is permissible based on Sunnah and consensus. In this regard, it is narrated that the Prophet (pbuh) raced two groups of horses.<sup>1</sup> Moreover, Muslims have been in consensus that such racing is allowed.

In this regard, racing for a prize is exempted from three prohibitions: gambling, causing harm to animals without eating them, and a compensator being himself the compensated, if each of the racing parties puts-up part of the prize to be one.<sup>2</sup>

In this regard, racing without a prize are universally permitted with no restrictions, just as other athletic competitions without prizes are allowed. Proof for the legality of uncompensated racing is provided by the proof of ʿĀʾisha (mAbpwh) that she raced the Messenger (pbuh) and beat him, but he kept racing her until she got tired and he beat her and said: “Now we’re even”.<sup>3</sup> It is also narrated that Salamah ibn Al-ʿAkwaʿ raced a man from the ʿAnṣār and beat him in front of the Prophet (pbuh).<sup>4</sup> It is also narrated that the Prophet (pbuh) wrestled with Rukānah and beat him.<sup>5</sup> Finally, it is narrated that the Prophet (pbuh) passed by people who were lifting rocks in a strength

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<sup>1</sup>Narrated by Al-Bukhārī and Muslim on the authority of ibn ʿUmar, c.f. Al-Ṣanʿānī (2nd printing, vol.4, p.70), ʾIbn Daqīq Al-ʿĪd (, p.358).

<sup>2</sup>Al-Dardīr ((Mālikī)A, vol.2, p.209).

<sup>3</sup>Narrated by ʾAḥmad, ʾAbū Dāwūd, Al-Shāfiʿī, Al-Nasāʾī, ʾibn Mājah, ibn Ḥibbān and Al-Bayhaqī on the authority of ʿUrwah on the authority of his father on the authority of ʿĀʾisha, c.f. Al-Shawkānī (, vol.8, p.91).

<sup>4</sup>Narrated by Muslim and ʾAḥmad, c.f. Al-Shawkānī (, ibid.).

<sup>5</sup>Narrated by ʾAbū Dāwūd on the authority of Muḥammad ibn ʿAliy ibn Rukānah, c.f. Al-Shawkānī (, ibid.).



competition, and he (pbuh) did not admonish them. Thus racing and other types of competition are legalized by analogy to those examples.

On the other hand, the Ḥanafīs ruled that racing or competing for a prize is only allowed in four forms: racing with (i) arrows or spears, (ii) horses, donkeys, and mules, (iii) camels, cows, etc., and (iv) on foot. They ruled thus based on the view that the first three are tools of war that Muslims were ordered to learn in the verse “Prepare for them what you can of force” [8:60], and the Prophet (pbuh) explained force as power in throwing.<sup>6</sup> Moreover, the Prophet (pbuh) said: “Only three types of idle activity are allowed: training horses, playing with one’s family, and archery; for they are good ways of spending time”.<sup>7</sup>

The above mentioned Ḥadīths also legalize racing on foot and wrestling, and since they develop skills useful in war. In this regard, the Shāfi‘īs said that physical and athletic competitions for a prize are permitted, since they encourage people to prepare for war.

The non-Ḥanafī jurists ruled that racing or competing for a reward is only allowed for the use of swords and arrows, and horse or animal-back riding. They based this ruling on the Ḥadīth: “No competition is allowed except in racing with animals, or competing with weapons”.<sup>8</sup>

In contrast, they ruled that foot-racing and wrestling for a reward are not allowed, since such skills are not of much use in war. In this regard, ‘Abū Dāwūd narrated in his *Marāsīl* that the Prophet (pbuh) only wrestled with Rukānah to illustrate his strength and convince him to accept Islam, which he did.<sup>9</sup> However, as we have seen, all types of physical competition are allowed without compensation.

## 125.2 Permissibility conditions

The jurists stipulated a number of conditions for the permissibility of competing for a reward, including:

1. The competition must involve a skill that is useful in war. The Ḥanafīs listed four eligible competitions: the use of weapons, horses and the like, camels and the like, and racing on foot. The non-Ḥanafīs only accepted competition for a prize in the first three categories.

<sup>6</sup>Narrated by Muslim and ‘Aḥmad on the authority of ‘Uqbah ibn ‘Āmir, c.f. Al-Shawkānī (, ibid.), Al-Ṣan‘ānī (2nd printing, vol.4, p.71).

<sup>7</sup>Narrated by ‘Abū Dāwūd and Al-Tirmidhī on the authority of ‘Uqbah ibn ‘Āmir, c.f. the research of the hadīths of *Tuhfat Al-Fuqahā’* by Dr. Al-Zuhaylī and Prof. Al-Kittānī (vol.3, p.500).

<sup>8</sup>Narrated by ‘Abū Dāwūd and Al-Tirmidhī who deemed it Ḥasan. Also narrated by Al-Nasā’ī, Al-Shāfi‘ī, Al-Ḥākim, ‘ibn Mājah, ‘Aḥmad, and ibn Ḥibbān who deemed it valid along with ibn Al-Qaṭṭān. Also narrated by ibn Daqīq, on the authority of ‘Abū ‘Abū Hurayra, ibid, Al-Shawkānī (, vol.8, p.77), Al-Ṣan‘ānī (2nd printing, vol.4, p.71), Al-Haythamī (, vol.5, p.263).

<sup>9</sup>Al-Kāsānī ((Ḥanafī), vol.6, p.206), ‘Abū-Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.412 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.4, p.311 onwards), ‘Ibn Qudāmah (, vol.8, p.651 onwards; vol.9, p.172), Al-Dardīr ((Mālikī)A, vol.2, p.209), *Sharḥ Al-Risālah* (vol.2, p.417).



2. The reward must be offered from one of the two competitors, or from a third person, to avoid forbidden gambling. Thus, the prize is paid as a reward to encourage people to learn the skills of war.

On the other hand, if the prize is paid from both sides (*rihān*; a type of gambling) then a third person with equal skill or an equal horse (*muḥallil*) is required to legalize the otherwise forbidden transaction. Thus, they each pay a certain amount of money, and if the third person wins the race or competition, he wins the full prize, and if either one of the original two wins, he pays nothing and receives nothing. This ruling is based on the Ḥadīth: “If a third horse is added to the two racing horses, and there is a chance of the third horse winning, then that is not gambling. However, if the third horse is very unlikely to win, that is indeed gambling”.<sup>10</sup> On the other hand, if two raced so that the winner will get some money from the other, that will be clearly a form of forbidden gambling.

3. It must be probable for each of the competitors to win, otherwise the competition for a prize will not be allowed. In this case, the encouragement to learn certain skills would not be realized, and the procedure would merely amount to giving an amount of money to one party on a condition that has no benefit.
4. The Shāfi‘īs ruled that the reward must be known, and the beginning and end point of a race must be known.<sup>11</sup>

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<sup>10</sup>Narrated by ‘Aḥmad, ‘Abū Dāwūd, and ‘ibn Mājah on the authority of ‘Abū Hurayra. Some of the narrators deemed its chain of narrators to be weak, and other leading narrators found major faults with the validity of making ‘Abū Hurayra a narrator of this Ḥadīth. It was also narrated by Al-Ḥākim and ibn Ḥazm, each of whom deemed it valid, and also by Al-Bayhaqī, c.f. Al-Shawkānī (, vol.8, p.80), Al-Ṣan‘ānī (2nd printing, vol.4, p.71), ‘Ibn Daqīq Al-‘Id (, p.360).

<sup>11</sup>Al-Kāsānī ((Ḥanafī), ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.4, p.313 onwards), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.415 onwards), ‘Ibn Qudāmah (, vol.8, p.654 onwards), ‘Ibn Juzayy ((Mālikī), p.157 onwards), Al-Dardīr ((Mālikī)A, vol.2, pp.208-211).



## Chapter 126

### *Al-munāḍala*

This is a specific type of competition first considered by Al-Shāfi‘ī, according to Al-Muznī. We shall study its definition, types, legal status, and conditions.<sup>1</sup>

#### 126.1 Definition and legality

The term *munāḍala* means trying to beat another in competition, especially using a weapon. Together with other forms of athletic competitions, we have listed in the previous chapter the verses and Ḥadīths establishing its permissibility for male Muslims from the Qur’ān and Sunnah.

There are particular additional Ḥadīths that urge Muslims to learn archery. Thus, ‘Aḥmad and Al-Bukhārī narrated on the authority of Salamah ibn Al-‘Akwa‘ that the Prophet (pbuh) passed by a group competing in archery near the market. He (pbuh) said to them to learn this skill well, calling them “sons of Isma‘īl” who was a good marksman, and said that he will compete with one of the teams. When the other team decided to stop in order not to compete against the Prophet (pbuh), he said that he will be on both teams.

‘Aḥmad and the four compilers of *Sunan* also narrated on the authority of ‘Uqbah ibn ‘Āmir that the Prophet (pbuh) said: “Allāh admits three people into paradise for each single arrow: the one who made it hoping it will be used well, the one who prepares it for fighting in the way of Allāh, and the one who actually throws it”. Then, he (pbuh) was narrated to have said: “Learn archery and learn to ride horses, and learning archery is better”. We have reported other Ḥadīths in this regard in the previous chapter.

In this regard, competition in throwing is allowed for arrows and spears, as well as marksmanship with any instrument of war, as well as the use of swords. On the other hand, competition for a prize using balls of various types, or nuts thrown in a hole,<sup>2</sup> or swimming, or chess, or balance games, or guessing games,

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<sup>1</sup> Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.4, pp.311-319).

<sup>2</sup> Although Al-Māwirdī stated in the Ḥawī that it was permissible, contrary to Al-Nawawī’s opinion in *Al-Rawḍah*.



or foot-racing, or any other activity that is not useful in war.

On the other hand, the Shāfiʿīs ruled that all such competition is permissible if the winner does not win a prize.

Moreover, Al-Qurṭubī said that there is no disagreement about permissibility of racing on any animals, or on foot, or on using all types of weapons, etc. His proof was based on the Ḥadīth narrated by 'Aḥmad and 'Abū Dāwūd that the Prophet (pbuh) raced ʿĀ'isha on foot, and the narration of 'Aḥmad, Al-Bukhārī, and Muslim that Abyssinians played with spears in front of the Prophet (pbuh) in his Masjid.

## 126.2 *musābaqa* and *munāḍala* bindingness

The accepted opinion among the Shāfiʿīs is that both contracts are binding if a prize is stipulated. Thus, if two racing competitors agree with a third that he would win some money from each of them if he wins, neither one is allowed to void the contract. Moreover, neither party would be allowed to desist from following through with the promised action. The only exception allowed is if the two racers promising the reward agree with the third racer to void the first contract and replace it with another.

## 126.3 Legal status

The Shāfiʿī notion of *munāḍala* is identical to the general concept of *musābaqa*. Thus, it has three permissible forms, and one forbidden as gambling. Thus, if the compensation is (i) from the state treasury or a wealthy person, (ii) from one of the competitors, or (iii) from two competitors to a worthy third, the contract is valid. However, if the compensation is from the loser to the winner, then that constitutes forbidden gambling.

## 126.4 Conditions of validity

There are five conditions for the validity of *munāḍala*:

1. The parameters of competition must be stated clearly (e.g. the archers, the target and its size, the distance, the goal in terms of number and accuracy of hits, etc.). Such parameters must be specified to make the task similar to the parallel task in a war field.
2. All competitors must be using the same type of weapon. Thus, competition is not allowed with different weapons, even if the competitors agree to that.
3. The nature of scoring must be specified, e.g. does the weapon have simply to touch the target, at least scrape it, penetrate it, etc. If scoring is not specified, simply touching the target should be counted as a score.



4. The prize must be specified in type and amount. In the cases where a third party is required to avoid gambling, that is obviously stipulated as a condition.
5. The order of competition must be specified, otherwise the contract is deemed defective, since it may not be possible to tell who scored if they shoot at the same time.



## Part XXVI

### Preemption (*Al-Shuf'a*)



## Preliminaries

In this part, we shall study preemption (*al-shuʿa*) in eight chapters:

1. Definition, proof, wisdom, cornerstone, components, instigating factor, legal status, and characteristics.
2. Object of *al-shuʿa*.
3. Entitlement to *al-shuʿa*, prioritization of competing preemption rights, absence of some preemptors, preemptors forfeiting their preemption right.
4. Legal status rulings for *al-shuʿa*.
5. Conditions of *al-shuʿa*.
6. Procedures for exercising preemption rights.
7. Growth, diminution, or dealings in objects of preemption.
8. Dropping preemption rights.



## Chapter 127

# Basics of Preemption (*al-shuḥḥa*)

### 127.1 Definition

The Arabic term for preemption is derived from the verb *shafaʿa*, meaning to combine, increase, or fortify. This term is used for preemption since the preemptor combines what he owns by virtue of this right to his own property, thus increasing and fortifying it. The term also alludes to the property becoming part of a *shafʿ* (even), rather than *witr* (odd, or single), since one single property was owned prior to exercising the right, and it was combined with another after its exercise.

The Ḥanafīs defined the term legally as the right to claim ownership of a sold immovable object, thus taking it from the buyer (with or without his consent) in exchange for its price and any expenses that he paid. It is legalized to avoid the harm caused by introducing new unwanted partners or neighbors.<sup>1</sup> Thus, the Ḥanafīs establish preemption rights for partners and neighbors of the owner of a property offered for sale.

The non-Ḥanafī jurists defined preemption as a contract-language based entitlement of one partner to take the portion of joint immovable property exchanged by his partner, and pay its price or value in exchange. In other words, it is a right established for an old partner over a new partner, to take ownership of his share with or without his consent, with fair compensation.<sup>2</sup> Thus, they established preemption rights only for partners, and not for neighbors.

It is worthy of note that the four major Sunni schools restricted preemption rights to immovable properties. In contrast, the Ṣāḥirīs allowed it also for

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<sup>1</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.152), Ibn Al-Humām ((Ḥanafī), vol.7, p.406), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.239), ʿAbd Al-Ḡhanī Al-Maydānī ((Ḥanafī), vol.2, p.106).

<sup>2</sup>Al-Dardīr ((Mālikī)B, vol.3, p.630), Al-Dardīr ((Mālikī)A, vol.3, p.473), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.296), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.196), Ibn Qudāmah (, vol.5, p.284).



movable objects, such as animals.<sup>3</sup>

## 127.2 Proof and reason for its legality

Proofs of the legality of preemption (*al-shufʿa*) is taken from the Sunnah, and consensus:

- Proof from the Sunnah is established by numerous *Ḥadīths*:
  - It was narrated on the authority of Jābir (mAbpwh) that the Prophet (pbuh) ruled that preemption rights are established for undivided properties. If boundaries are delineated, and roads are paved and delineated, then there is no preemption any more”.<sup>4</sup> In another narration, this ruling was applied to land, homes, and orchards.
  - In another *Ḥadīth* narrated by Jābir: “A neighbor is more worthy of buying his neighbor’s property. Thus, his decision must be awaited, even if he is absent. This is legalized since they share a road.”<sup>5</sup>
  - Samurah narrated the *Ḥadīth*: “The neighbor of a house is more worthy of buying it than a third party”.<sup>6</sup>
  - There is also a *Ḥadīth* by ‘Abū Rāfiʿ that states: “A neighbor has a first right to buying adjacent property”.<sup>7</sup>
- Moreover, proof is provided by consensus. In this regard, ‘ibn Al-Mundhir said that all scholars are in agreement regarding preemption rights for a partner who has not engaged in delineation of the boundaries of his property, be it land, a real estate, or an orchard. In fact, there is only one person (*Al-ʿAṣamm*) who is known to have disagreed with this ruling. The latter ruled that *al-shufʿa* is not established legally, arguing that it causes harm to property owners. He based his dissenting ruling on the view that buyers will be discouraged from trying to buy any property for which preemption rights are established, which limits his ability to deal in what he may buy, thus harming the owner. On the other hand, his opinion was rejected, since it contradicts the well-established *Ḥadīths* in this regard, as well as the consensus that was reached prior to his dissent.<sup>8</sup>

## 127.3 Wisdom in legalizing preemption

The reason preemption rights are established is to prevent the harm caused to a property owner by introducing a permanent relationship of partnership or

<sup>3</sup>Ibn Ḥazm (, vol.9, p.101 #1594).

<sup>4</sup>A valid *Ḥadīth* narrated by ‘Aḥmad, Al-Bukhārī, ‘Abū Dāwūd, and ‘ibn Mājah.

<sup>5</sup>Narrated by ‘Aḥmad and the four authors of *Sunan*.

<sup>6</sup>Narrated by ‘Aḥmad, ‘Abū Dāwūd, and Al-Tirmidhī (who deemed it valid). Also narrated by Al-Bayhaqī, Al-Ṭabarānī and Al-Diyā’. However, its chain of narration is questionable.

<sup>7</sup>Narrated by Al-Bukhārī, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, pp.172-5), Al-Shawkānī (, vol.5, pp.331-6).

<sup>8</sup>Ibn Qudāmah (, vol.5, p.284).



neighborhood. This harm can be substantial if the new partner or neighbor is feared to act poorly in using joint property (e.g. raising a high wall, lighting a fire, blocking sunlight, stirring dust, etc.), especially if the new partner or neighbor is an old adversary.

The Mālikīs, Shāfiʿīs, and Ḥanbalīs also found benefit in establishing preemption rights to avoid the transaction costs and harm caused by dividing property between the selling partner and the potential preemptor. This type of harm, as well as the previously mentioned types, are forbidden on the basis of the *Ḥadīth*: “No harm is allowed in Islam”.

Moreover, part of being a good partner or good neighbor is to protect the benefits of one’s partner or neighbor, as the law dictates.<sup>9</sup> Thus, the Ḥanafīs ruled that such care to benefit others and not cause them any harm extends beyond partners, and includes neighbors (for whom they thus establish preemption rights).

## 127.4 Cornerstone, and instigating factor

The Ḥanafīs ruled<sup>10</sup> that the cornerstone of preemption is the preemptor’s taking a property from one of the contracting parties, when the instigating factor and conditions of preemption apply. In this regard, the instigating factor for preemption is partnership or neighborhood, and its condition is that the object of sale and preemption is an immovable property (which may be only the upper or lower portion of a building).

The Mālikīs stipulated four cornerstones for preemption:<sup>11</sup> (i) a preemptor, (ii) a buyer from whom the property is taken, (iii) an object of preemption, and (iv) language implying verbally or otherwise that the preemptor has exercised his right and taken the property.

The Shāfiʿīs and Ḥanbalīs enumerated three cornerstones for preemption:<sup>12</sup> (i) a preemptor, (ii) one from whom the property is taken, and (iii) object of preemption. Moreover, they ruled that valid language is required to establish ownership for the preemptor (e.g. “I have taken ownership of this property”, or “I have taken this property by exercising my preemption right”).

## 127.5 Legal status and characterization

The Ḥanafīs ruled<sup>13</sup> that if the instigating factor for preemption is established, the preemptor may request to exercise his right even years after the first sale,

<sup>9</sup>Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.239), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.296), Ibn Qayyim Al-Jawziyyah ((Ḥanbalī)a, vol.2, p.120), Ibn Qudāmah (, vol.5, p.284), Al-Dardīr ((Mālikī)A, vol.3, p.476).

<sup>10</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.152 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), ibid.).

<sup>11</sup>Al-Dardīr ((Mālikī)B, vol.3, p.630 onwards), Ibn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, p.253).

<sup>12</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, pp.296,300), Ibn Qudāmah (, vol.5, p.297), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.158).

<sup>13</sup>Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.153 onwards), Al-Zaylaʿī ((Ḥanafī Jurisprudence), ibid.).



if he did not know of the sale until then. Moreover, taking a property based on preemption rights is tantamount to a new purchase, thus establishing all the rights for the preemptor that are established for a buyer, e.g. the inspection and defect options to return the property to the seller.



## Chapter 128

# Object of Preemption

Muslims are in agreement that preemption rights are established in immovable objects such as homes, land, orchards, wells, buildings, trees, etc. However, there are differences over preemption rights for other properties.

The four major Sunni schools agreed that no preemption rights are established for movable properties, such as animals, clothes, etc. They based this ruling on the above mentioned *Ḥadīth* narrated by Muslim, Al-Nasā'ī, and 'Abū Dāwūd, which explicitly listed the establishment of preemption in land, homes, and orchards. Moreover, jurists argued that *al-shuḥḥa* was legalized to prevent permanent harm to partners (or, Ḥanafīs also argued, to neighbors). In this regard, since movable properties are significantly more transient than immovable ones, the harm of partnership in movable properties cannot be viewed as permanent. The insistence on permanent harm is required for legalizing preemption, since it allows taking a property against its buyer's will, thus limiting the rights of the seller and the buyer. Such severe limitation can only be justified if the harm resulting from its removal is substantial and permanent.<sup>1</sup>

### 128.1 Vertical neighborhood

The Ḥanafīs ruled that immovable properties that are eligible for preemption include the upstairs portion or the downstairs portion of a building.<sup>2</sup> This opinion seems to be the most reasonable.

Moreover, the Ḥanafīs ruled that preemption applies to divisible as well as indivisible properties (e.g. a very small home, a mill, or a well). They based this ruling on the instigating factor for preemption being the prevention of

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<sup>1</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, p.153), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.435), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.239), Al-Kāsānī ((Ḥanafī), vol.5, p.12), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.109), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.254), Al-Dardīr ((Mālikī)A, vol.3, p.482), Al-Dardīr ((Mālikī)B, vol.3, p.634), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.296), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.376), 'Ibn Qudāmāh (, bol.5, p.287), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, pp.153-5).

<sup>2</sup>Ibn 'Ābidīn ((Ḥanafī), ibid.), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.435).



harm caused by partnership or neighborhood, whether the relevant property is divisible or indivisible.

In contrast, the Ḥanbalīs and most of the Shāfiʿīs ruled that preemption rights are not established for the upstairs portion of a properties. They based this ruling on the view that the upstairs portion uses the roof of the lower floor as a foundation. Then, they reasoned that since that roof is not permanently fixed, the upper floor of a building must have the legal status rulings of movable properties.<sup>3</sup>

Most non-Ḥanafī jurists of the Mālikīs, Shāfiʿī, and Ḥanbalī schools also disagreed with the Ḥanafī ruling regarding divisibility of the property. Thus, they ruled that preemption is only established for divisible properties, relying on the above mentioned *Ḥadīth* of Jābir, which explicitly limited preemption for properties that were not in fact divided. While jurists disagreed over the legitimacy of using this *Ḥadīth* as proof that the property must be divisible, they in fact accepted the restriction of preemption to divisible properties. They ruled this ruling on their view that the instigating factor for preemption is avoidance of harm caused by dividing the property, thus applying only to divisible properties.<sup>4</sup>

## 128.2 Easement rights

The Ḥanafīs ruled that the presence of easement rights (e.g. private watering rights for animals and plants, c.f. *Al-Majallah* (item #1262), or passage right on a private road) establishes preemption rights.<sup>5</sup> On the other hand, they ruled that watering rights from public water sources, or passage rights through public roads, do not establish preemption rights. In this context, private roads are defined as those that do not give access to the public roads.

Thus, for instance, they ruled that if a group of people shared ownership of a river and watering rights thereof, then if a part of that land is sold, all others with watering rights from the private river have preemption rights. On the other hand, they ruled that if watering rights were designated from a public river, then only the immediate neighbors have preemption rights. They ruled similarly for public roads, whereby all who have passage rights have preemption rights, otherwise only neighbors do.

The Mālikīs ruled in this regard<sup>6</sup> that no preemption rights are established for a shared private road if the house is divided among the partners. They based this ruling on the fact that the road would in this case be attached to a divided

<sup>3</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.3, p.297), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.155).

<sup>4</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.255), Al-Dardīr ((Mālikī)A, vol.3, p.476), Al-Dardīr ((Mālikī)B, vol.3, p.634), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.297), 'Abū-'Ishāq Al-Shirāzī ((Shāfiʿī), vol.1, p.377), 'Ibn Qudāmāh (, vol.5, p.289).

<sup>5</sup>Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.239 onwards), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.154), ʿAbd Al-Qhanī Al-Maydānī ((Ḥanafī), vol.2, p.106).

<sup>6</sup>Al-Dardīr ((Mālikī)A, vol.3, p.482), Al-Dardīr ((Mālikī)B, vol.3, p.640), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.255).



home, for which no preemption rights are established. Hence, the derivative rights of the road cannot include preemption rights when the principal property is not eligible for preemption. They ruled similarly for the common yard of a divided house, for which no preemption rights are thus established.

The Shāfi'īs ruled<sup>7</sup> that no preemption rights are established for passage ways from a sold home to the public road. On the other hand, they ruled that preemption rights are established for internal passageways, in exchange for their share of the price, provided that the homeowners have no other way of accessing their property. However, if it is easy to create a direct access to the public road for each partner, no preemption rights would be established. Those rulings follow from the fact that preemption causes harm to the buyer, and preemption was legalized to avoid a different harm of partnership. However, one harm cannot be removed by introducing another harm, if there is another way of removing it.

The Ḥanbalīs agreed with the Shāfi'ī rulings<sup>8</sup> that no preemption is established for a house or its private road if the house has direct access to a public road. They based this ruling on the view that no partnership really exists in such properties once the house has direct outside access. In addition, the Ḥanbalīs ruled that no preemption rights are established, even if the road in question did not have access to a public road, and the house had no other roads. They based the latter ruling on the view that such preemption rights would harm the buyer, since the house would continue to have no access to public roads.

On the other hand, if the house can have an easy access to the public road built, they consider the characteristics of the passageway sold with the property:

- If the passageway was indivisible, then no preemption rights are established.
- If it was divisible, then preemption rights must be established. This ruling is based on the classification of the passageway as divisible jointly owned land, which thus must have preemption rights established, to abide by the above mentioned *Ḥadīth*.

### 128.3 Preemption rights in ships

Jurists of all school are in agreement<sup>9</sup> that ships are movable properties, and thus are not eligible for preemption rights. As a possible exception, Al-Kāsānī reported<sup>10</sup> that 'Imām Mālik ruled that ships are used for residence, and thus

<sup>7</sup> Al-Ramlī ((Shāfi'ī), vol.4, p.145), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.298).

<sup>8</sup> Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.154), 'Ibn Qudāmah (, vol.5, p.290).

<sup>9</sup> Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.190), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.376), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.296), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.155).

<sup>10</sup> Al-Kāsānī ((Ḥanafī), vol.5, p.12). However, the author (Dr. Al-Zuhaylī) said that he could not find in any Mālikī reference an opinion supporting preemption rights in ships. Indeed, the Mālikī jurist 'Ibn 'Abdulsalām said that what some Ḥanafīs reported regarding the opinion of 'Imām Mālik in this regard is false, c.f. *Sharḥ Al-Tannūkhī lirisālat Al-Qayruwānī* (vol.2,



are eligible for preemption in analogy to other immovable residences. However, research by 'Ibn 'Abdulsalām has shown that this claim is false. Thus, we can claim that all four Sunni schools agree that preemption is not established for ships.

## 128.4 Preemption in crops, fruits, and trees

The non-Mālikī jurists ruled<sup>11</sup> that preemption is not established for immovable properties (e.g. buildings or trees) that are sold separately from the land. However, they ruled that if such properties are sold as attachments to the land, then preemption must be established thus.<sup>12</sup>

In this regard, most Shāfi'īs also ruled that un-picked fruits may be attached in sales to the land, in analogy to buildings and trees. In contrast, the Ḥanbalīs ruled that only trees and buildings may be attached to the land, and have preemption established accordingly. Thus, they excluded crops and fruits from attachment to the land, since they do not pass the permanence criterion for establishing preemption.

The Mālikīs allowed<sup>13</sup> preemption in buildings and trees, even if sold separately from the land. They ruled thus on the basis of classifying buildings and trees as immovable properties, since they are attached to the land. On the other hand, they ruled that no preemption is established for animals or tradable movables, unless they are sold in conjunction with the land.

For instance, they ruled that if trees or buildings were planted or built on a *waqf* land while it was leased to multiple parties, on condition that those additions belong to the lessees, then if one of them sells his share, each other lessee has a preemption right.

Moreover, the Mālikīs allowed preemption in fruits, vegetables, and similar plants that stay in the land for some time.<sup>14</sup> Thus, if one partner in such fruits or vegetables sells his share separately from the land, the other partner is entitled to take it through preemption. In this regard, the Mālikīs ruled that for fruits to be taken separately through preemption, they must exist separately from the tree at the time of purchase.

On the other hand, the Mālikīs did not permit preemption in crops, or plants that are pulled with their roots from the ground (e.g. carrots, onions, etc.). Thus, if such plants are sold together with the land, preemption will only

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p.193).

<sup>11</sup> 'Ibn Al-Humām ((Ḥanafī), vol.7, p.435), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.296 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.155).

<sup>12</sup> *Al-Majallah* (item #1019) stated that preemption is not allowed for trees and buildings on land established as a *waqf*.

<sup>13</sup> Al-Dardīr ((Mālikī)A, vol.3, p.479 onwards), Al-Dardīr ((Mālikī)B, vol.3, pp.634,638-9), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.254 onwards), 'Ibn Juzayy ((Mālikī), p.286), *Sharḥ Al-Risālah* (vol.2, p.192).

<sup>14</sup> Mālik said regarding preemption in fruits that he knew of no precedent of allowing it, but that he allowed it based on juristic approbation, *Sharḥ Al-Tannūkhī lirisālat Al-Qayrawānī* (vol.2, p.192).



be established for the land, in exchange for its share of the price, and not for the plants.

In contrast, the *Ẓāhirīs* expanded the range of preemption rights significantly beyond all other schools. Thus, they allowed it for all objects of sale, movable or immovable, and attached or unattached to an immovable property. They also did not differentiate in their permission between divisible and indivisible properties.<sup>15</sup>

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<sup>15</sup>*Ibn Ḥazm* (, vol.9, p.101 #1594).



## Chapter 129

# The Preemptor

### 129.1 Definition

We have seen that the Ḥanafīs ruled that a preemptor may be a partner or a neighbor, while the non-Ḥanafīs ruled that only a partner may be a preemptor. In what follows, we shall discuss this distinction in some detail.

The Ḥanafīs ruled<sup>1</sup> that preemption rights are established for a partner in the object of sale itself, or in the easement rights associated with it (e.g. watering rights from a private river and right of passage through a private road). Moreover, they ruled that the immediate neighbor has a preemption right to the object of sale, even if his house-door opened to a different road. In this regard, an adjacent neighbor is considered an immediate neighbor whether he has only a one-foot common wall, or three sides of adjacency. In this regard, they ruled that one who co-owns a beam in the wall of a building is deemed a neighbor and not partnership in the building. This follows from the fact that preemption is established for immovable properties, and wood is movable. Finally, they ruled that preemption rights are established for Muslims as well as respected religious minorities (i.e. Jews and Christians), since the proofs legalizing preemption are general, and since all such individuals are subject to the same instigating factors and reasons for establishing preemption.

Thus, they refer to the above mentioned general *Ḥadīths* legalizing preemption for neighbors, including: “The neighbor of a house is more worthy of buying the neighboring property”,<sup>2</sup> “The neighbor of a house is more worthy of the house and land of his neighbor”,<sup>3</sup> and “A neighbor is more entitled to preemp-

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.5, p.4), 'Ibn Al-Humām ((Ḥanafī), vol.7, pp.406,414,436), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, pp.239-241), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.106), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.155).

<sup>2</sup> Narrated by Al-Bukhārī on the authority of 'Abū Rāfi', c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.174).

<sup>3</sup> Narrated by 'Abū Dāwūd, Al-Tirmidhī, Al-Nasā'ī, 'Aḥmad, Al-Ṭabarānī, ibn 'Abī Shaybah, and ibn Ḥibbān. It was deemed by Al-Tirmidhī to be a *Ḥadīth Ḥasan Ṣaḥīḥ* on the authority of Al-Ḥasan on the authority of Samurah, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.172).



tion”.<sup>4</sup> Moreover, they inferred from those *Ḥadīths* that the instigating factor for establishing preemption is the prevention of permanent harm caused by having bad neighbors, as well as bad partners, thus establishing preemption in both cases to prevent harm.

The non-Ḥanafīs ruled<sup>5</sup> that preemption is only established for a partner, and only in undivided property offered for sale. Thus, they ruled that a partner who received his share has no preemption rights, a partner has no preemption rights for the easement rights of sold property, and neighbors have no preemption rights.

The Mālikīs, Shāfi‘īs, and Zāhirīs ruled in agreement with the Ḥanafīs that a non-Muslim has preemption rights over his Muslim partner. In contrast, the Ḥanbalīs ruled that non-Muslims do not have preemption rights over Muslim sales of immovable property, based on the *Ḥadīth*: “No preemption rights are established for Christians”.<sup>6</sup> They used the specific instance mentioned in this *Ḥadīth* to infer their more general ruling. Moreover, they reasoned that preemption rights for a property are established in analogy to adding more floors over a building, which a non-Muslim is not allowed to do to a Muslim, since the partnership would harm the latter. In this regard, the non-Ḥanbalī ruling seems to be more appropriate, since the *Ḥadīth* used as proof by the Ḥanbalīs is weak.

The non-Ḥanbalī jurists also agreed that preemption rights are established for one non-Muslim over another, again relying on the generality of the above listed *Ḥadīths*, as well as the fact that non-Muslims are equal to Muslims in debts and sanctity of their property. Moreover, preemption rights are established for heretics that were legally deemed to still be Muslims. On the other, hand the Ḥanbalīs ruled that heretics who were legally deemed non-Muslims have no preemption rights over Muslims, while the non-Ḥanbalīs maintained that they do.<sup>7</sup>

The non-Ḥanafīs argued against establishing preemption rights for neighbors, based on the above mentioned *Ḥadīth* of Jābir: “The Prophet (pbuh) ruled that preemption is established for all undivided properties. Thus, if boundaries are delineated, and roads are paved, no preemption is allowed”, and the *Ḥadīth* of Sa‘īd ibn Al-Musayyab: “If land is divided and delineated, then there is no preemption thereof”.<sup>8</sup> Thus, they reasoned that if preemption is not allowed for a partner who took his share and thus became a neighbor, it certainly should not

<sup>4</sup>Narrated by Al-Tirmidhī on the authority of Jābir.

<sup>5</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.253), Al-Dardīr ((Mālikī)A, vol.3, p.473), Al-Dardīr ((Mālikī)B, vol.3, p.631), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.297), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.377 onwards), ‘Ibn Qudāmah (, vol.5, p.285 onwards,357), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, pp.149,182), ‘Ibn Juzayy ((Mālikī), p.286), ‘Ibn Ḥazm (, vol.9, p.115 #1598).

<sup>6</sup>Narrated by Al-Dāraquṭnī in *Kitāb Al-‘Ilal* on the authority of ‘Anas and ‘Abū Bakr (mAbpwt). However, he and ibn ‘Udayy deemed its chain of narration to be weak, due to including Bābil ibn Najīh.

<sup>7</sup>Ibn Qudāmah (, vol.5, p.358 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.183).

<sup>8</sup>Narrated by ‘Abū Dāwūd, and Mālik, as a *Ḥadīth mursāl* on the authority of ‘Abū Salamah ibn ‘Abdulrahmān.



apply to one who has merely been a neighbor and never a partner. Moreover, they reasoned, since the default ruling is impermissibility of putting restrictions on trading, preemption rights are established as an exception, which is thus limited to the cases mentioned in the *Ḥadīth*.

As for the *Ḥadīth* of 'Abū Rāfi<sup>c</sup> that “a neighbor is more worthy of the neighboring property”, the non-Ḥanafis argued that this *Ḥadīth* is not explicitly regarding preemption rights. Indeed, it is conceivable that what is meant by the *Ḥadīth* is to encourage neighbors to visit their neighbors and be good to them. Moreover, the *Ḥadīth* of Jābir is much more specific and explicit, and thus should be given priority over the one of 'Abū Rāfi<sup>c</sup>. All the other *Ḥadīths* that the Ḥanafis relied on to establish preemption for neighbors have weak links in their chains of narration. For instance, the *Ḥadīth* of Samurah is narrated by Al-Ḥasan, who was only known to have narrated one other *Ḥadīth* regarding <sup>c</sup>*aqīqah* (feeding people to celebrate a newborn baby). Thus, the non-Ḥanafis ruled that the term for neighbor in the *Ḥadīths* of preemption should be understood to mean partner. This opinion seems to be the most appropriate, since the default legal ruling is freedom in transactions, and preemption causes many complications, and thus must only be established for partners.

'Ibn Al-Qayyim chose a compromise between the Ḥanafī and non-Ḥanafī positions. Thus, he ruled that preemption is established for a neighbor only if he shares any easement rights with his neighbor, which is a type of partnership.<sup>9</sup> Al-Shawkānī and some Shāfi<sup>c</sup>ī jurists also found this compromise appealing, relying on the wording in the *Ḥadīth* of Jābir: “If they share a common road”.<sup>10</sup>

## 129.2 Prioritizing preemption rights

The Ḥanafis ruled<sup>11</sup> that the priority order of preemption rights is as follows:

1. A partner in the object of sale.
2. A partner in easement rights, i.e. an ex-partner who took his share of the property and continues to be a partner in easement rights (e.g. private watering or passage).
3. An immediate (adjacent) neighbor.

For the second category:

- They did not distinguish between preemption rights established to partners in easement rights on the basis of distance.

<sup>9</sup>Ibn Qayyim Al-Jawziyyah ((Ḥanbalī)a, vol.2, pp.123-132).

<sup>10</sup>Al-Shawkānī (, vol.5, p.333).

<sup>11</sup>Ibn Al-Humām ((Ḥanafī), vol.7, pp.406,412 onwards), 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, p.154 onwards), Al-Kāsānī ((Ḥanafī), vol.5, pp.8-9), Al-Zayla<sup>c</sup>ī ((Ḥanafī Jurisprudence), vol.5, p.239), <sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.106 onwards), *Al-Majallah* (item #1008).



- 'Abū Ḥanīfa and Muḥammad defined a private source of water as a small river too small for ships.<sup>12</sup> Moreover, all Ḥanafī scholars agreed that a river is deemed small if the number of partners in watering rights is small, where some defined a small number to be less than forty, others defined it as less than five-hundred, and later jurists ruled that this has to be decided separately for each time and place.
- A private road is defined to be one that is restricted to a specific group, in which case all who have passage rights thereof have preemption rights.

The Ḥanafīs based the above listed prioritization of preemption rights on the *Ḥadīth*: “A full partner has priority over one with common ownership, and the latter has priority over a preemptor”.<sup>13</sup> They also reasoned that the order is chosen based on the strength of the underlying reason, in terms of the strength of the potential preemptor’s connection to the property (in terms of co-ownership, easement rights, or neighborhood). The Ḥanafīs ruled that if multiple preemptors exist and have the same priority, then the property must be divided among them, as we shall see briefly.

## 129.2.1 Allocation among multiple preemptors

### 1. Different priority-ranks

If the multiple preemptors had different priority ranks, then the one with the highest priority rank is given the option of preempting the sale, c.f. *Al-Majallah* (item #1009). Thus, if one of the preemptors is a partner, he would be given the priority, followed by a partner in easement rights, followed by a neighbor. In this regard, a partner in a wall is deemed equivalent to a partner in the entire house, whereas a partner in wood beams on his neighbor’s house is considered an adjacent or immediate neighbor, and not a partner, c.f. *Al-Majallah* (item #1012). Moreover, upstairs neighbors and downstairs neighbors are considered immediate neighbors, c.f. *Al-Majallah* (item #1011).

With regards to easement rights, watering rights are given priority over passage rights, c.f. *Al-Majallah* (item #1016). Moreover, if someone entitled to a watering or passage right sells his land alone and not the easement right, partners in easement rights are not given preemption rights, c.f. *Al-Majallah* (item #1015). Finally, if two partners share the same general category, more specific easement rights (e.g. drinking rights from a stream) are given priority over more general ones (e.g. general watering rights), c.f. *Al-Majallah* (item #1014).

<sup>12</sup>'Abū Yūsuf defined a private source of water as a river barely large enough to water two or three farms, c.f. 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.107).

<sup>13</sup>Al-Zayla'ī found this *Ḥadīth* to be strange, and 'ibn Al-Jawziyy said that it had no basis. Shurayḥ said: “A partner has priority over a neighbor, and a neighbor has priority over others”. 'Ibrāhīm Al-Nakh'ī said: “A partner has first priority in preemption. If there is no partner, then preemption is established for the neighbor. A partner has priority over a preemptor, and a preemptor has priority over all others”, c.f. Al-Ḥafīẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.176).



## 2. Equal priority-ranks

If all preemptors had the same priority-ranking, e.g. if they were all partners in the sold property, the property should be divided among all preemptors who wish to exercise their rights. In this case, the Ḥanafīs<sup>14</sup> and Zāhirīs<sup>15</sup> ruled that all willing partners should be given equal shares, irrespective to their ownership shares. This ruling is based on the view that the partners are thus equal in the instigating factor for preemption rights, since they are equal in the type of ownership rights.

The other jurists (excluding Ḥanafīs and Zāhirīs) ruled<sup>16</sup> that the property should be divided among the willing preemptors in proportion to their ownership shares. They based this ruling on the view that preemption is a right based on ownership, and thus must be exercised in proportion to ownership shares. This ruling is analogous to entitlements to fruits, output, or rents resulting from ownership, and profits in corporations, which are determined in proportion to ownership. Moreover, the jurists argued that preemption was legalized to prevent harm to the owners, and each owner's potential harm is proportional to his ownership share.

The Mālikīs ruled further<sup>17</sup> that more specific partnerships (which are associated to specific shares in the property) should be given priority over others.

Thus, if a property owner dies, and is inherited by two grandmothers, two wives, and two sisters, and one of them sold her share, only the heir sharing in that share (i.e. of equal entitlement) is given a preemption right. More specifically, if the two partners in a share were a paternal aunt and a full-sister, or a paternal niece with a daughter, then if the sister or daughter sold her share, the aunt or niece may exercise her preemption right with priority over male heirs.

Moreover, they ruled that the closer association to the share of the seller gets priority over the more general (e.g. residual inheritors who are not partners in specific inheritance shares). For instance, if a man dies and leaves behind one or more daughters, and two brothers or two paternal uncles, then if one of the brothers sells his share, preemption rights are established for the daughters, and the other brother or uncle have no exclusive right for preemption.

In another example, if a man left behind three daughters, and one of them died and left behind two daughters, then if one of the sisters of the deceased daughter dies and her other sister sold her share, the daughters of the deceased daughter have preemption rights. This ruling is based on the view that descendants have closer and stronger ties than other relationships.

<sup>14</sup> Al-Kāsānī ((Ḥanafī), vol.5, p.6), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.241), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.116), ʾIbn ʿĀbidīn ((Ḥanafī), vol.5, p.154), ʾIbn Al-Humām ((Ḥanafī), vol.7, p.414), *Al-Majallah* (item #1013).

<sup>15</sup> ʾIbn Ḥazm (, vol.9, p.120 #1609).

<sup>16</sup> Al-Dardīr ((Mālikī)B, vol.3, p.646), Al-Dardīr ((Mālikī)A, vol.3, p.486 onwards), ʾIbn Ruṣhd Al-Ḥafīd ((Mālikī), vol.2, p.257), ʾIbn Juzayy ((Mālikī), p.287), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.305), ʾAbū-ʾIshāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.381; vol.5, p.335), Al-Buhūtī (3rd printing (Hanbalī), vol.4, p.164).

<sup>17</sup> Al-Dardīr ((Mālikī)A, vol.3, p.492), Al-Dardīr ((Mālikī)B, vol.3, p.650 onwards).



Similarly, male heirs have preemption rights over individuals named in a will and given a share in immovable property inheritance, to the exclusion of others named in the will. Moreover, heirs are always given priority over non-relatives, unless the heirs willingly drop their preemption right.

### 129.3 Absent preemptors

The Ḥanafīs ruled<sup>18</sup> that if some of the preemptors were present, and others were absent, at the time of sale, then if the present preemptors demand to exercise their right, they should be allowed to do so. They based this ruling on the view that the present preemptor is thus known to wish to exercise his right, while the absent preemptor's wishes can only be guessed. Thus, exercise of the present preemptor's right should not be deferred, since certain rights should not be postponed to accommodate probable ones.

If the absent preemptor later arrives and demands exercising his right, then:

- If he has the same priority rank as the present preemptor, the first division is voided, and the property is re-divided to allow the two preemptors to share it.
- If the absent preemptor had a different rank-ordering from the present one (this scenario is only possible within the Ḥanafī framework), then the preemptor with the higher ranking is given the property and the other one is excluded.

The Mālikīs, Shāfi'īs, Ḥanbalīs, and Zāhirīs agreed with the Ḥanafī that absent preemptors are still granted preemption rights.<sup>19</sup> They based this ruling on the generality of the Prophet's (pbuh) that "preemption is established in undivided properties". Moreover, they reasoned, preemption rights are financial rights which are established for absent parties, in analogy to inheritance. In this regard, the absent partner's preemption right is established at the time he finds out about the sale, in analogy to present preemptors whose rights are established instantly. In this regard, any harm caused to the buyer who loses the property is remedied by the value that the preemptor pays him.

### 129.4 Voluntary dropping of preemption rights

The Ḥanafīs ruled that if some preemptors voluntarily drop their rights:<sup>20</sup>

<sup>18</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.6), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.156), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.242).

<sup>19</sup>Al-Dardīr ((Mālikī)A, vol.3, p.490), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.306), 'Ibn Qudāmah (, vol.5, p.305 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.164), 'Ibn Ḥazm (, vol.9, p.115 #1598), Al-Dardīr ((Mālikī)B, vol.3, p.644).

<sup>20</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.156), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.241), *Al-Majallah* (item #1043).



1. If the right is dropped prior of legal determination of their right to preemption, they thus exclude themselves from preemption considerations, and the remaining preemptors are allowed to take the entire object of preemption.
2. If a preemptor dropped his right after he was assigned a portion of the property, remaining preemptors are not allowed to take his share. This ruling is based on the view that assignment of property shares separates the ownership of partners, and thus the remaining preemptors have no partnerships in the dropped share.

The Mālikīs, Ḥanbalīs, and most of the Shāfi'īs ruled<sup>21</sup> that the preemption right of any preemptor who drops it is dropped like all other financial rights. Thus, other preemptors have the option of taking the entire object of preemption, or leaving it all; but they are not allowed to take only their share or only his share. This ruling follows from the view that the dropper of his preemption right thus dropped it all (in analogy to dropping the right to exacting physical punishment – *qiyās*), to avoid partitioning the deal for the buyer. 'Ibn Al-Mundhir reported that all scholarly opinions he knew agreed with this ruling, since dividing the deal for the buyer is harmful for him, and harm cannot be removed by introducing another harm.

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<sup>21</sup> Al-Dardīr ((Mālikī)A, vol.3, p.490), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.306), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.164), 'Ibn Qudāmah (, vol.5, p.338).



## Chapter 130

# Legal Status Rulings

### 130.1 Establishment of ownership

The Ḥanafīs ruled<sup>1</sup> that preemption rights are established after any sale, including defective sales that were not voided for some reason, or sales including a buyer-option. On the other hand, they ruled that no preemption right is established by the mere inception of a defective sale, since a defective sale must be legally voided. In this regard, establishing a preemption right after such a defective sale would be accepting of its defectiveness, which is not allowed. However, if the voiding is dropped, e.g. through dealing in the purchased property or building on it, then the impediment to establishing preemption rights would thus vanish. Moreover, they ruled that no preemption is established in sales with seller-options, since such options preserve the seller's ownership. In contrast, buyer-options do not preserve seller-ownership, and thus may serve as grounds for establishing preemption rights.

Moreover, they ruled that a preemptor must indicate his wish to exercise his preemption right promptly. The preemption is then established upon second statement in front of witnesses. Finally, preemption results in transfer of ownership to the preemptor either by mutual consent, or by court order.

In other words, the preemptor can own the property in one of two ways: (i) the buyer may give it to him voluntarily, or (ii) through a court order, even before taking possession of the property. This ruling is based on the fact that the property belongs to the buyer upon conclusion of the sale, and thus ownership cannot be transferred to the preemptor without mutual consent or a court order, in analogy to the ruling for returned gifts. The court order clause is permitted since the ruler has general guardianship which allows him to rule for such transfers of property rights.

Consequently, the preemptor is not granted any ownership rights except

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<sup>1</sup> Al-Kāsānī ((Ḥanafī), vol.5, p.23 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.417), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, pp.242,254), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.154), 'Abd Al-Ghānī Al-Maydānī ((Ḥanafī), vol.2, pp.107,114), *Al-Majallah* (items #1036,1038).



through one of the above mentioned venues. Thus, the Ḥanafis ruled that properties pending preemption are not inherited if the preemptor died prior to establishing ownership. Moreover, they ruled that if an owner sold his house while using it for a claim to preempt the sale of the neighboring house, his preemption is voided.

All schools agree about ownership being established through the above mentioned two venues.<sup>2</sup> On the other hand, the Mālikīs ruled that ownership through preemption may be established in three ways: (i) through a court order, (ii) payment of the price to the buyer, (iii) declaring before witnesses that he took the property through preemption, even in the buyer's absence.

The non-Ḥanafis do not recognize preemption rights in any defective sales, since they equate defectiveness and invalidity in that case. However, the Mālikīs made an exception for the case where the buyer in a defective sale re-sold the object in a valid sale, in which case the preemptor is allowed to take it from the second buyer in exchange for the price he paid. Moreover, they ruled that if the property was substantially changed in the possession of a buyer in a defective sale, the preemptor may take the property in exchange for its value if there is agreement about the defectiveness, and the price if there is disagreement thereof.

Note that owning an immovable property through preemption is tantamount to a new purchase. Thus, the preemptor has the right of returning the property based on defect and inspection options, as in other sales contracts.<sup>3</sup> In this regard, the preemptor gains ownership of whatever the buyer in the preempted sale had owned accordingly, either independently or as part of owning another property (e.g. buildings, crops, trees, and fruits). The Ḥanafī based the latter ruling on juristic approbation, since ownership rights to an immovable property automatically apply to all attached movable properties, by matching the legal status of the branch to that of the root.<sup>4</sup>

## 130.2 Compensation

### 130.2.1 The Price to be paid

Jurists are in agreement that a preemptor takes the property in exchange for the price or compensation paid by the buyer. Thus, the preemptor must make a payment of the genus and amount of the price, and not the property itself,<sup>5</sup> based on the *Ḥadīth* of Jābir's statement: "Then he is more worthy of paying

<sup>2</sup>Al-Dardīr ((Mālikī)B, vol.3, pp.640,647), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.300), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.177), 'Ibn Qudāmah (, vol.5, p.346 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.487).

<sup>3</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.24), *Al-Majallah* (item #1037), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.246 onwards).

<sup>4</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.27 onwards).

<sup>5</sup>'Ibn Al-Humām ((Ḥanafī), vol.7, p.427 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.249), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, pp.114-5), Al-Dardīr ((Mālikī)B, vol.3, pp.635,637), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.301), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.378 onwards), 'Ibn Qudāmah (, vol.5, p.322), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.177), 'Ibn Ruṣṣd Al-Ḥafīd ((Mālikī), vol.2, p.256).



its price”.<sup>6</sup> The preemptor must also compensate the buyer for any other costs borne, e.g. brokerage and documentation fees.

If the price of the property was non-fungible, then the preemptor should take the property in exchange for its value (since it is the compensation in loans and destruction of property) assessed at the time the contract becomes binding and preemption is established.

If two houses were traded for one another, and there was only one preemptor for both properties, he may thus take each of them in exchange for the value of the other used as its compensation. If there are two different preemptors for the two exchanged properties, each of them may take the property for which he had preemption rights in exchange for the value of the other property.

If a non-Muslim bought a house in exchange for wine or a pig, and the preemptor was also non-Muslim, he may take the house for the equivalent of the wine (fungible), or the value of the pig (non-fungible). In contrast, the non-Ḥanbalīs ruled that a Muslim preemptor in this case would take the property in exchange for the value of the wine or the pig.

In those cases, jurists are in agreement that the value of the price is determined on the day of sale, not the day of taking the property by preemption. This ruling is based on the view that the day of the sale is the day of establishing preemption rights and liability for the price.

In contrast, the Ḥanbalīs ruled that no preemption is possible for properties purchased by a non-Muslim and paid for in wine or pigs, since those are non-properties.<sup>7</sup>

### 130.2.2 Reduction or increase in the price

The Ḥanafīs ruled<sup>8</sup> that if the seller reduces the price of the property before or after it is taken by preemption, the preemptor is entitled to the same discount. This ruling follows from appending the discount to the original sales contract, and thus affects the preemptor’s right since he is thus entitled to take the property in exchange for its discounted price.

On the other hand, if the seller drops the entire price liability on the buyer, the preemptor would still be responsible for the full price. This follows from the fact that dropping liability for the entire price cannot be appended to the sales contract, which thus becomes a gift. Non-Ḥanafī jurists agreed with the Ḥanafīs on this ruling.

If the buyer increases the price, or renews the sales contract with a higher price, the preemptor is not required to pay the higher price. This follows from the fact that the higher price would be harmful to him, after having been entitled to take the property at the original lower price. In contrast, the discount was allowed to affect the preemptor liability since it benefited him.

<sup>6</sup>Narrated by ‘Abū ‘Ishāq Al-Jūzjānī in *Al-Mutarjam*.

<sup>7</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.152).

<sup>8</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.107), <sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.115 onwards), ‘Ibn Al-Humām ((Ḥanafī), vol.7, p.427), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.248 onwards), Al-Kāsānī ((Ḥanafī), vol.5, p.27).



The Shāfi'īs and Ḥanbalīs ruled<sup>9</sup> in this case that the preemptor is bound by any increase or discount in the price during the option period (i.e. before the contract becomes binding). This follows from the fact that the preemptor's right is only established after the contract is concluded, and all options are dropped. Thus, said changes would be appended to the contract, and affect the price that the preemptor would have to pay. On the other hand, changes in price after the contract is binding cannot be appended to the contract, and do not affect the preemptor's right. In this regard, increases in price after the option period elapses are deemed to be gifts, and subject to gift conditions.

### 130.2.3 Price deferment

All Ḥanafīs other than Zufar, and most Shāfi'īs according to the new Shāfi'ī opinions ruled<sup>10</sup> that if the price, or part thereof, is deferred, the preemptor does not get to benefit from this deferment offered to the buyer. In this case, the preemptor is given the option of taking the property and paying the price immediately, or waiting until the term of deferment expires to take the property and pay the price, without dropping his preemption right. In this case, however, the preemptor must indicate his intention to exercise the preemption right at the time of sale, otherwise he would lose it. The latter ruling follows from the fact that the preemption right is established immediately upon conclusion of the sales contract. However, the preemptor is allowed to establish that right, and then wait to exercise it at the end of the price deferment period.

On the other hand, the preemptor is not allowed to take the property and pay its deferred price, since the purpose of preemption is not to change the contract as it is from the buyer to the preemptor. Instead, preemption is a voiding of the contract of sale to the buyer, and replacing it with a sale to the preemptor.

In contrast, Zufar ruled that the preemptor in this case has the right to benefit from the term of deferment. He reasoned that deferment in this case is a characteristic of the price paid by the buyer, and preemption dictates taking the property in exchange for the price with all its characteristics.

The Mālikīs and Ḥanbalīs ruled<sup>11</sup> that the preemptor is allowed to benefit from the stipulated price deferment given to the buyer, provided that he is rich and trustworthy, or guaranteed by one who is. Otherwise, they ruled that the preemptor must pay the price immediately to protect the buyer's interests. This opinion seems to be the most appropriate one, since it protects the interest of the buyer who lost the contract due to preemption.

<sup>9</sup>Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.4, p.149), 'Ibn Qudāmah (, vol.5, p.322), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4,p.177).

<sup>10</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.103), Al-Kāsānī ((Ḥanafī), vol.5, pp.24,27), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.428), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5,p.249), Al-Ramlī ((Shāfi'ī), vol.4, p.150), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.301), 'Ibn Hubayrah ((Ḥanbalī), p.277).

<sup>11</sup>Al-Dardīr ((Mālikī)B, vol.3, p.637), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.256), 'Ibn Qudāmah (, vol.5, p.323), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.179).



### 130.2.4 Predication on price payment

Most Ḥanafīs, the Shāfiʿīs, the Mālikīs, and the Ḥanbalīs ruled<sup>12</sup> that the preemption is established without a court order, price payment, or presence of the buyer. They ruled thus since the preemption right is established immediately upon the property was sold to another, to protect the preemptor. Thus, it is as though the seller actually sold the property to the preemptor, and owning a property by virtue of such a sale is not predicated upon price payment.

However, the Mālikīs ruled that if the preemptor indicated his intention to take the property in preemption, he is given three days to bring the price, otherwise his preemption is voided.

Moreover, Muḥammad ibn Al-Ḥasan ruled that a judge may only rule that the property is taken through preemption when the preemptor brings the price, to protect the buyer. Indeed, the preemptor may be bankrupt, and thus the judge should give him two or three days to produce the price. This ruling is based on the view that prevention of harm to the preemptor cannot be removed by harming the buyer. However, this scenario that Muḥammad feared can be avoided, as 'Abū Ḥanīfa and 'Abū Yūsuf argued, by allowing the buyer to keep the property in his possession until the preemptor pays the price.

Al-Kāsānī chose a compromise between the two positions, arguing that the difference in opinion is only semantic. Indeed, he reasoned, all jurists agreed that the judge may establish preemption prior to price payment, since he found Muḥammad's language to indicate that the judge should take care in this case, but may certainly declare preemption without price payment.

### 130.2.5 Entitlement of the preempted property

The Ḥanafīs ruled<sup>13</sup> that if the preemptor took the property from the buyer and paid him the price, and then the property was found to belong to another, the buyer would be responsible to compensate the preemptor for the price. This ruling is based on the view that the buyer thus received that price when the property was transferred to the preemptor. This seems to be the most reasonable opinion.

On the other hand, the seller may be made responsible for compensating the preemptor, since the seller received the price from the buyer before preemption and further transfer of property.

The Mālikīs, Shāfiʿīs, and Ḥanbalīs ruled<sup>14</sup> that if the preemptor took the property and found a defect therein, he is thus entitled to take back the price or

<sup>12</sup> Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.119), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.245), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.422), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.112), Al-Kāsānī ((Ḥanafī), vol.5, p.24 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.300), Al-Dardīr ((Mālikī)B, vol.3, pp.647-9), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.177).

<sup>13</sup> 'Ibn Al-Humām ((Ḥanafī), vol.7, p.433), 'Ibn ʿĀbidīn ((Ḥanafī), vol.5, p.160), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.119), Al-Kāsānī ((Ḥanafī), vol.5, p.30).

<sup>14</sup> Al-Dardīr ((Mālikī)A, vol.3, p.493), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.383), 'Ibn Qudāmah (, vol.5, p.344 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.182).



a compensation from the buyer, and the buyer may in turn seek compensation from the seller. This ruling follows from the view that the preemptor takes the property from the buyer based on his ownership of it, and thus must seek compensation from him for defects as if he was the seller.

### 130.2.6 Disagreements over price

The majority of jurists of all schools ruled<sup>15</sup> that if the buyer and the preemptor disagree over the price for which the property was purchased, the buyer's claim is accepted if supported by his oath. This ruling follows from the view that the buyer is more informed regarding the price he paid. Moreover, the preemptor is claiming a lower price, and the buyer is denying that claim, and thus his counterclaim is accepted if supported by his oath.

However, the Mālikīs restricted this acceptability of the buyer's claimed price to the case where this price is within the reasonable range of assessments. Otherwise, they ruled that the preemptor's claimed price will be accepted if it is closer to the range of professional assessments.

If neither claimed price is within the reasonable range, then they should both be asked to take an oath supporting his own claim and denying the other's. If they both take the oath, or both refuse to do so, the price should be assessed at the mid-point of the reasonable range of assessments.

The Ḥanafīs also ruled<sup>16</sup> that if the buyer and preemptor disagree over the genus or characteristics of the price, the buyer's claim is accepted, since he should have better information in this regard. Moreover, the preemptor is deemed to be claiming that the buyer owned the property by paying in a certain genus, and the buyer is denying that claim. Hence, the buyer's counterclaim should be accepted if backed by his oath.

One of the characteristics of the price affected by this ruling is deferment. Thus, if the preemptor claims that the buyer bought the property for a deferred price, and the buyer claimed that he had in fact paid the price immediately, the buyer's claim is accepted. In this case, the default is immediate payment of the price, the preemptor is claiming deferment, and the buyer is denying it. Thus, the buyer's claim is accepted.

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<sup>15</sup> Al-Kāsānī ((Ḥanafī), vol.5, pp.30-2), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.424), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.115), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.261), Al-Dardīr ((Mālikī)B, vol.3, p.656), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.304), 'Ibn Qudāmah (, vol.5, pp.328,333).

<sup>16</sup> Al-Kāsānī ((Ḥanafī), vol.5, pp.30-2).



## Chapter 131

# Preemption Conditions

Jurists had some differences over the following five major conditions of preemption:

1. Negation of all seller ownership rights in the preempted, with no options established.
2. The contract must be a commutative financial contract, such as a sale or equivalent.
3. The contract must be valid.
4. The preemptor must have ownership from the sale time to the time of ruling that he has the right of preemption.
5. The preemptor must be objecting to the sale.

In addition, the following conditions were stipulated by some jurists:

- The non-Ḥanafīs stipulated further that the preemptor must be a partner in the sold property, thus excluding preemption by neighbors, as we have seen. They also required the object of sale to be an unidentified share in a divisible property.
- All jurists agreed that the preemptor must take the entire sold part of the property, to avoid harming the buyer by partitioning his contract. This follows from the principle that one harm cannot be removed by imposing another.
- We have already discussed at length that the object of preemption must be an immovable property for some jurists.
- While some jurists stipulated a condition that the object of preemption cannot be owned by the preemptor prior to sale, there is no need to discuss this condition, since it is impossible for him to acquire ownership of what he already owned.



- Finally, we shall discuss the order of seeking preemption with mutual consent first, or seeking a court order first. We shall study this issue in the chapter on preemption procedures.

### 131.1 Negation of seller ownership

The seller's ownership in the sold immovable property must be totally negated through a final and binding sale devoid of any option. Thus, preemption is not established if the sale had a stipulated seller option, until the sale becomes binding. All jurists are in agreement regarding this condition.

On the other hand, jurists differed over buyer-options in the sale. Thus, the Ḥanafīs and the majority of Shāfi'īs ruled<sup>1</sup> that preemption is established if the buyer had an option condition. The Ḥanafīs based this ruling on their view that buyer-options do not prevent negation of seller ownership. The Shāfi'īs based this rule on their view that ownership of the property is established for the buyer during his option period. Moreover, defect and inspection options do not prevent negation of seller ownership, and hence do not prevent the establishment of preemption rights.

The Mālikīs and Ḥanbalīs ruled<sup>2</sup> preemption is not established if there are any options for the seller or the buyer, until the option expires. They based this ruling on the view that establishing preemption is binding upon the buyer, with or without his consent, and establishes a liability on him for possible defects in the property,<sup>3</sup> while negating his right to demand compensation for the price from the seller.

### 131.2 Contract must be commutative

Preemption rights are only established if the immovable property is given by the owner in a commutative contract equivalent to sales (including a gift with compensation, or exchange for a debt), whether or not the sold property was established as a *waqf*.

The ruling for preemption in sales follows immediately from the above mentioned Ḥadīth of Jābir: "If he sells it without his permission, the preemptor has a stronger claim to buy it". The Ḥanafīs further ruled for properties given in gifts with compensation that preemption is established upon mutual receipt, since that is the essence of commutative contracts. Thus, 'Abū Ḥanīfa, Muḥammad, and 'Abū Yūsuf ruled that preemption rights are not established in mutual gifts if only one of the recipients received the other's gift. They based this ruling

<sup>1</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.13), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.438), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.253 onwards), 'Ibn 'Abidīn ((Ḥanafī), vol.5, pp.160,167), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.114), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.299).

<sup>2</sup>'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.256), Al-Dardīr ((Mālikī)B, vol.3, p.633), 'Ibn Qudāmah (, vol.5, p.294), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.181).

<sup>3</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.182).



on their classification of mutual gifts as a contribution at its inception, and an exchange in the end. This logic also restricts the ruling to the case of a gift and a compensation neither of which is an unspecified share in a property, to qualify as a pure contribution. In contrast, Zufar ruled that preemption is established by virtue of the contract itself. He based this ruling on his classification of compensated gifts as exchange contracts from inception to end.

The non-Ḥanafīs did not stipulate the condition that mutual receipt is required for establishing preemption in compensated gift contracts. They based this ruling on their classification of gifts as binding contracts. Since the recipient of the gift thus owns it for a compensation, the essence of exchange, and preemption rights, are thus established even prior to receipt.

If a house is given as a compensation for absolution from a debt, the Ḥanafīs ruled that preemption rights are established, whether the creditor accepts, rejects, or reserves judgment regarding use of the house to repay the debt.

The majority of Mālikīs also accept the condition of commutativity of the contract.<sup>4</sup> Thus, they ruled that no preemption is established if the property is given with no compensation (e.g. a pure gift, establishment as a *waqf*, and bequests). This ruling follows from the fact that preemption results on obligatory transfer of ownership from the buyer to the preemptor in exchange for the price and expenses he paid. In contrast, if the property was given without compensation, and preemption was established, the preemptor would thus get the property for free, and against the will of its original preemptor.

On the other hand, jurists differed in opinion regarding properties exchanged with non-properties, e.g. dowry, financial compensation to the husband for divorce, physician or lawyer fees, rent for a house, or financial compensation accepted in settling liability for physical punishment in murder. The jurists' opinions in this case were as follows:

- The Ḥanafīs and Ḥanbalīs ruled<sup>5</sup> that the contract must be an exchange of properties. Thus, they ruled in the above mentioned examples that preemption is not established. They based this ruling on the view that non-property compensations for property are similar to gifts and inheritance, and there is no equal for such compensations that the preemptor can pay it in a valid preemption.

In this regard, the Ḥanbalīs ruled that preemption is not established by any compensated exchange that constitutes a voiding of the contract, e.g. return based on defect, or a revocation of sale.

The Ḥanafīs also ruled that if partners divide a joint immovable property among them, their neighbor has no preemption right established by virtue

<sup>4</sup> Al-Kāsānī ((Ḥanafī), vol.5, p.11), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, pp.239,252), 'Ibn Al-Humām ((Ḥanafī), vol.7, pp.436-8), 'Ibn ʿAbidīn ((Ḥanafī), vol.5, pp.157,165), ʿAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.110), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.255 onwards), 'Ibn Juzayy ((Mālikī), p.287), Al-Dardīr ((Mālikī)B, vol.3, p.633 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfiʿī), vol.2, p.298), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʿī), vol.1, p.376 onwards), 'Ibn Qudāmah (, vol.5, p.291), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.152).

<sup>5</sup> Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, pp.229,252-3), 'Ibn Qudāmah (, vol.5, p.292).



of the division. This ruling follows from the fact that division is not a pure exchange (recall: it also involves a sorting aspect), and partners have priority over neighbors.

Moreover, they ruled that if the preemptor declined to exercise his preemption right, and then the buyer returned the property based on any option (e.g. inspection, condition, or defect option exercised by court order), then the preemptor has no rights. This ruling follows from such return of property constituting a complete voiding of the contract, and preemption applies to new contracts. On the other hand, if the property was returned without a court order, or based on a revocation of the sale, the preemptors right is still established. The latter ruling follows from the view that voiding the sale in this case constitutes voiding for the original seller and buyer, in addition to a new sale for the preemptor, who was also party to an exchange of properties with mutual consent, i.e. another sale.<sup>6</sup>

- The Mālikīs and Shāfi'īs ruled<sup>7</sup> that the requirement is only that the contract in which preemption is established is a commutative contract, whether or not both compensations were properties. They based this ruling on the view that the objective of preemption is to prevent harm to the partner from introducing a new partner, which applies in all commutative contracts. Moreover, they reasoned, the contract is always tantamount to a sale, since it constitutes ownership of an immovable property in a commutative contract. In the case of non-property compensation, the preemptor has to pay the value of the compensation received by the seller, in analogy to tradable commodities used as a price in sales. Thus, they ruled that the compensation that is not a physical property still constitutes a valued property, and may thus be substituted by their value if the equivalent is not available. For instance, if the property was taken in a marriage or compensated divorce, the preemptor can pay the market equivalent of the dowry or compensation in divorce.

### 131.3 Validity of the contract

Jurists agreed on the condition that the contract resulting in preemption is valid.<sup>8</sup> They based this ruling on the view that negation of the sellers ownership is required for preemption. Hence preemption is not established in properties made object of a defective sale, since religious law dictates voiding such a contract and returning the property to the seller. Hence, such sales are not

<sup>6</sup>cAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.120), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.152 onwards).

<sup>7</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.255), 'Ibn Juzayy ((Mālikī), p.287), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.298).

<sup>8</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.13), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.254), cAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.114), Al-Dardīr ((Mālikī)B, vol.3, p.640), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.298), 'Ibn Qudāmah (, vol.5, p.291).



binding, and may be voided by the buyer or seller, and thus cannot establish preemption. Moreover, preemption in a defective sale would be tantamount to approving of its defectiveness, which is inappropriate.

On the other hand, the *Shāfiʿīs* and *Mālikīs* ruled<sup>9</sup> that the preemption is established if defectiveness of a sale is voided due to increase in the sold property, re-sale by the buyer, etc. In such cases, they ruled that the possibility of voiding the sale was an impediment to establishing preemption, and that impediment is removed once the contract cannot be voided. Thus, the ruling is analogous to the case where the sale included a conditional option, which was later dropped, at which point preemption is established.

The *Ḥanafīs* ruled in the case of a defective sale, followed by the buyer re-selling the property, that the preemptor has an option of taking the property by virtue of the first or the second sale. In this case, they reasoned, the preemptors right is established in both sales. However, they argued, if he decides to exercise his right by virtue of the second sale, he must pay the price of that sale. In contrast, if he takes by virtue of the first sale, he must pay the value of the property on the day it was received by the first buyer, since defective sales result in ownership in exchange for the property's value and not the named price. Moreover, they argued that the property's value is assessed at the time of receipt since guaranty of the property is established at the time of receipt, in analogy to usurped properties. We have seen in the previous chapter that the *Mālikī* rulings in this case are similar to their *Ḥanafī* counterparts.

## 131.4 Preemptor ownership at sale time

Jurists agreed that the preemptor must own the property that entitles him to preemption prior to the sale in which he exercises his preemption right. However, they differed over whether or not ownership must be established until the time a court order establishes the preemption right:

- The *Ḥanafīs* ruled<sup>10</sup> that the preemptors ownership must be in effect until the time a court-order establishes his preemption right. Thus, his right to preemption is voided if he sold his property before his request of enforcing his preemption right is honored legally. They based this ruling on the view that preemption was legalized to prevent harm to the preemptor, and no such harm from the buyer can be perceived if he sold his neighboring or joint property. Similarly, they ruled that the preemptors right is voided before his claim of preemption is honored legally, whether or not he knew that the joint or neighboring property was sold.
- The non-*Ḥanafīs* ruled<sup>11</sup> that preemptor ownership needs to be established only at the time of sale, and need not continue until preemption is recog-

<sup>9</sup> *Al-Kāsānī* ((*Ḥanafī*), *ibid.*), *Al-Dardīr* ((*Mālikī*)B, *ibid.*).

<sup>10</sup> *Al-Kāsānī* ((*Ḥanafī*), vol.5, p.14), *Ibn Al-Humām* ((*Ḥanafī*), vol.7, p.446), <sup>c</sup>*Abd Al-Ghanī Al-Maydānī* ((*Ḥanafī*), vol.2, p.113), <sup>r</sup>*Ibn ʿĀbidīn* ((*Ḥanafī*), vol.5, pp.157,170).

<sup>11</sup> *Ibn Rushd Al-Ḥafīd* ((*Mālikī*), vol.2, p.260), *Ibn Juzayy* ((*Mālikī*), p.287), *Al-Khaṭīb Al-Shirbīnī* ((*Shāfiʿī*), vol.2, pp.298,303,308 onwards), *Al-Ramlī* ((*Shāfiʿī*), vol.4, p.308),



nized legally. Thus, the Shāfi'is ruled that even if the preemptor sold his share or gave it at as a gift, then his preemption right is dropped if he did not have partnership at the time of sale.

All jurists agree that this condition implies that a lessee or borrower residing in leased or borrowed property has no preemption right. Similarly, no preemption rights are established for owners who sold their property, made it a Masjid, or established it as a *waqf*, prior to the sale. In the latter case, the supervisor of a *waqf* is not deemed an owner, and thus no preemption right is established for *waqf*. On the other hand, the Ḥanafis permitted exchanging *waqf* properties in cases of necessity. Thus, if the *waqf* is sold, and thus ceases to be a *waqf*, they establish a preemption right for its neighbor.

The Ḥanafis also established preemption rights in the case of sale of property designated by the owner as *waqf*, but without official recognition thereof.<sup>12</sup> Similarly, they established preemption for land subject to the agricultural taxes (*ushr*, or *kharāj*), since they are deemed owned. In contrast, feudal lands owned by the state have no preemption rights.

The Mālikīs ruled<sup>13</sup> that the state is allowed to take property for the state treasury through preemption. For instance, if one of two partners dies without having any heirs, and the state thus inherited his share of the property, then the state may exercise preemption rights on behalf of its treasury if the other partner sells his share. Similarly, if a man dies leaving behind only a daughter, who thus inherits half his property, then the state may exercise its preemption right if she sells her share.

The differences in opinion among Ḥanafis and non-Ḥanafis yield different rulings for the inheritability of preemption rights:

- The Ḥanafis ruled that preemption rights are not inherited if the preemptor died before his right was recognized legally. Thus, an heir has no preemption right by virtue of any property that his benefactor sold during his life.
- The non-Ḥanafis ruled that preemption rights can be inherited, provided that the first preemptor claimed his right to preempt a sale prior to his death. They based this ruling on the view that an heir is a vicegerent of his benefactor, and thus inherits all his rights, including preemption, to avoid harm caused by new partners in his inheritance.

This difference in opinion is analogous to the difference regarding inheritance of conditional options. The basic question in both cases is whether or not legal rights can be inherited the way properties are inherited. We have seen in this

<sup>12</sup>Abū 'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.383), 'Ibn Qudāmah (, vol.5, pp.317,346), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.263), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, pp.153,158,176), Al-Dardīr ((Mālikī)B, vol.3, p.645), Al-Dardīr ((Mālikī)A, vol.3, pp.474,487).

<sup>13</sup>Abū Ḥanīfa ruled that establishing property as a *waqf* becomes binding, and ownership is negated for its owner, only upon a court order, or death of the owner, c.f. 'Ibn Al-Humām ((Ḥanafī), vol.3, p.10).

<sup>13</sup>Al-Dardīr ((Mālikī)B, vol.3, p.632), Al-Dardīr ((Mālikī)A, vol.3, p.474).



regard that the Ḥanafis ruled that legal rights are not inherited, while the non-Ḥanafis ruled that they are.<sup>14</sup>

### 131.5 Preemptor objects to the sale

Jurists agreed that if the potential preemptor verbally indicated his approval, or failed to indicate his objection for a long time without excuse, his preemption right is dropped. This ruling is based on the fact that the preemptor has an option of taking the sold property to prevent harmful partnership, or letting the sale stand.

In this regard, the Mālikīs estimated a period of silence long enough to indicate letting the sale stand to be one year, provided that the preemptor is present and knows of the sale. On the other hand, it is important for preemption right to be dropped that no deception in terms of the buyer, the price, or the object of sale is utilized to trick the preemptor into dropping his right.<sup>15</sup> If any such deception or misinformation regarding the buyer, the price, or the object of sale was used, the preemptors right would thus be maintained.

On the other hand, the Mālikīs and most of the Shāfi'īs and Ḥanafis ruled that if the misinformation was such that it would encourage the preemptor to exercise the right (e.g. if the price was in fact higher than what he was told, or was in fact deferred), then his preemption right is thus dropped. This ruling follows, since unwillingness to take the property at a lower price implies unwillingness to take it at a higher price, and unwillingness to pay a deferred price implies unwillingness to pay immediately.

Similarly, they ruled that if the partner in fact sold only half of his share, but told the preemptor that he sold all of it, the preemptors right is dropped if he declined to exercise it for the whole. However, in this last case, 'Abū Yūsuf and the Ḥanbalis ruled that the preemptors right is not dropped. They reasoned that the preemptor may be unable to pay the price of the entire share, but may be able to pay for half. Alternatively, they argued, the half may be sufficient for the preemptors purposes, and he may not need the entire share of his partner.

In summary, despite disagreements over minor points, the majority of jurists are in agreement that a preemptors right is dropped if he declines to accept what is better for him than the actual sale.

#### Legal tricks to drop preemption

The Ḥanafis are in agreement that legal tricks to drop a preemption that is established after a sale are reprehensible to the point of prohibition. On the other hand, 'Abū Yūsuf ruled that tricks to prevent the establishment of preemption

<sup>14</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.116).

<sup>15</sup>Al-Kāsānī ((Ḥanafī), vol.5, pp.15,19-20), Al-Sarakhsī (1st edition (Ḥanafī), vol.14, pp.105,111), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.173), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.118), Al-Dardīr ((Mālikī)B, vol.3, p.643 onwards), Al-Ramlī ((Shāfi'ī), vol.4, p.159), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.379), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.308), 'Ibn Qudāmah (, vol.5, p.302), 'Ibn Juzayy ((Mālikī), p.286).



prior to the sale are not reprehensible if the neighbor does not need the object of preemption. He based this ruling on the view that a prevention of establishing a right does not amount to causing harm to the potential preemptor. In contrast, Muḥammad deemed such legal tricks reprehensible as well. He based his ruling on the view that preemption is legalized to prevent harm, and thus allowing a trick that drops that right makes the harm unpreventable.<sup>16</sup>

However, the majority of Ḥanafīs and Shāfiʿīs accepted the opinion that tricks to drop preemption rights prior to the sale are permissible. For instance, a seller may give the buyer part of the property as a gift, and then sell him the rest to preempt the potential preemptor. In contrast, the Ḥanbalīs and Mālikīs explicitly forbade all tricks to drop preemption rights. They based their ruling on the view that preemption was legalized to prevent harm, and such tricks make the harm unpreventable, which is tantamount to causing the harm.<sup>17</sup>

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<sup>16</sup>Ibn Al-Humām ((Ḥanafī), vol.7, p.450), 'Ibn <sup>c</sup>Ābidīn ((Ḥanafī), vol.5, p.173), <sup>c</sup>Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.118).

<sup>17</sup>Ibn Qudāmāh (, vol.5, p.326 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.149 onwards), 'Ibn Hubayrah ((Ḥanbalī), p.276).



## Chapter 132

# Preemption procedures

The jurists classified preemption as a “weak right. Thus, they ruled that it can only result in ownership if the preemptor abides by its specific procedures, including requesting to exercise his right immediately upon knowing of the sale.

In this regard, the Ḥanafīs ruled that three requests are required in preemption: (i) immediate request to exercise the preemptors right, (ii) request of witnessing that he wishes to exercise his right, and that the seller and buyer recognize that right, and (iii) request of taking ownership of the sold property.<sup>1</sup> Before proceeding to a discussion of those procedures, we should review the opinions of various jurists regarding the timing of exercising preemption rights.

### 132.1 Time of exercising preemption rights

The Ḥanafīs ruled that the preemptor must make a request to exercise his right immediately upon knowledge of the sale. They based this ruling on their classification of preemption rights as weak rights, and such weak rights require strengthening by immediate requests of exercise.

In contrast, Imām Mālik ruled that the request to exercise of the preemption right may come anytime within a year after the contract, according to his better accepted opinion.<sup>2</sup>

The majority of Shāfi‘īs ruled<sup>3</sup> that the preemptor must request exercising his right immediately upon knowing of the sale. They based this ruling on the view that preemption is legalized to avoid harm, and thus must be exercised immediately in analogy to returning defective merchandise. In this regard, they

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<sup>1</sup> *Al-Majallah* (item #1028), *Al-Kāsānī* ((Ḥanafī), vol.5, p.17), *Al-Ṭahāwī* ((Ḥanafī), p.120 onwards), *Ibn Al-Humām* ((Ḥanafī), vol.7, pp.416,418 onwards), *Al-Zayla‘ī* ((Ḥanafī Jurisprudence), vol.5, p.242), *Ibn ‘Ābidīn* ((Ḥanafī), vol.5, p.157 onwards), *‘Abd Al-Ghānī Al-Maydānī* ((Ḥanafī), vol.2, pp.107,112).

<sup>2</sup> *Al-Dardīr* ((Mālikī)A, vol.3, p.487 onwards), *Al-Dardīr* ((Mālikī)B, vol.3, pp.639,645), *Ibn Rushd Al-Ḥafīd* ((Mālikī), vol.2, p.259).

<sup>3</sup> *Abū-‘Ishāq Al-Shīrāzī* ((Shāfi‘ī), vol.1, p.380), *Al-Khaṭīb Al-Shirbīnī* ((Shāfi‘ī), vol.2, p.307), *Ḥāshiyat Al-Bājūrī* (vol.2, p.19), *Al-Qalyūbī* ((Shāfi‘ī), vol.3, p.50).



considered the demarcation for delay of exercising the right to be determined by convention, for instance he must be allowed enough time to finish his prayers, or whatever he was doing.

Moreover, they ruled that if the preemptor was sick, afraid to travel, or away from the buyer's land, then he should appoint an agent if he can. If he cannot appoint an agent, then he should have two men of good character, or one man and two women, testify that he indicated his wish to exercise his preemption right. On the other hand, they ruled that if the preemptor does not attempt to appoint an agent or find agents, he would thus forfeit his preemption right.

The Ḥanbalīs agreed with the Shāfi'īs<sup>4</sup> that the preemptor should request exercising his right, in front of witnesses, immediately upon knowing of the sale, unless he had a valid excuse. Then, once his right is established by such an immediate request, he may demand taking the property from the buyer anytime later, even years after the sale.

Thus, we can see that the majority of jurists require the preemptor to request the exercise of his preemption right immediately, in-part based on the Ḥadīth: "Preemption is like unwrapping a head-dress".<sup>5</sup> They also based this ruling on their view that the buyer may be harmed if the preemptor is allowed to take a long time to demand exercising his right, since his ownership of what he bought will remain uncertain for that long period.

In contrast, the Mālikīs granted a preemptor a whole year to request exercising his right. They based their ruling on the view that silence does not invalidate a legal right for a Muslim, unless other factors require such a dropping. On the other hand, they allowed the buyer to make a request that the ruler ask the preemptor whether or not he intends to exercise the right. In the latter case, the preemptor may choose to exercise his right or to drop it. If the preemptor fails in this case to answer one way or the other, his right is thus forfeited.

## 132.2 Stages of requesting preemption

In this section, we shall review the sequence of requests of preemption as stipulated by the Ḥanafīs.

### 132.2.1 Immediate request to exercise preemption right

The preemptor must immediately indicate verbally that he intends to exercise his preemption right, and thus demand taking the sold object.<sup>6</sup> This ruling was based on the Ḥadīth: "Preemption is established for one who is quick to

<sup>4</sup>Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.156), 'Ibn Qudāmah (, vol.5, pp.299,306 onwards).

<sup>5</sup>This is a weak Ḥadīth narrated by 'ibn Mājah, Al-Bazzār, and 'ibn 'Udayy, on the authority of 'ibn 'Umar, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.176 onwards).

<sup>6</sup>*Al-Majallah* (item #1029).



demand it.<sup>7</sup> Having witnesses for this request is not required, but preferable to avoid the possibility of later denial by the buyer. This is analogous to the case of guaranty of a destroyed wall, where witnesses are not required for the guaranty, but may be needed to prove its instigating factor.

In this regard, the majority of Ḥanafīs established the preemptor right to make this first request for the entire period of the session of knowledge of the sale, however long. In contrast, the Shāfiʿīs and the Ḥanbalīs ruled that the first request must be made immediately upon knowing of the sale. Finally, we have seen that most Mālikīs allow a grace period of one full year for the first request to exercise preemption to be made.

### 132.2.2 Second confirmation request

The preemptor must then make a second request of preemption, to confirm his first one. This ruling is based on the view that the first request may be made hastily, and the preemptor may later discover that his condition and financial resources do not allow him to preempt the sale. Thus, a second confirmation request is required.<sup>8</sup>

This second request must follow shortly after the first one, and requires as witnesses two men, or one man and two women. The grace period allowed before this second request is made must be determined by the time required to get such witnesses.

The witnessing may be directed towards the seller if he still held the property, the buyer (the new owner), even if he did not receive it, or the property made object of preemption. Thus, the preemptor should say in front of the witnesses something to the effect: “so-and-so bought this house, and I am a preemptor. I have made a first request of preemption, and I now made a formal request, so be my witnesses”.

In this regard, having witnesses for this second request is not a condition of its validity, or the validity of the first request. Rather, witnessing in this case is stipulated for documentation purposes, in case the buyer denies that the request was made. If the preemptor was in a distant place, he may appoint an agent, or send a letter with his second request.

Moreover, if the first request to exercise his preemption right was made in front of witnesses, the seller who still held the property, the buyer, or the property, then no second request is necessary. In any such cases, the preemptor would have already established his seriousness and determination to exercise his preemption right.

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<sup>7</sup>Narrated by jurists in their books. Al-Zaylaʿī said that it was strange and of unknown origin (*gharīb*). It was narrated by ʿAbdulrazzāq as a statement of Shurayḥ, i.e. an *ʾathar* and not a Prophetic Ḥadīth, c.f. Al-Ḥāfiẓ Al-Zaylaʿī (1st edition, (Ḥadīth), vol.4, p.176).

<sup>8</sup>Al-Kāsānī ((Ḥanafī), vol.5, pp.18-19), ʾIbn Al-Humām ((Ḥanafī), vol.7, p.419 onwards), ʾIbn ʿĀbidīn ((Ḥanafī), vol.5, p.158), Al-Zaylaʿī ((Ḥanafī Jurisprudence), vol.5, p.243 onwards), ʿAbd Al-Qḥanī Al-Maydānī ((Ḥanafī), vol.2, pp.108-9), *Al-Majallah* (item #1020).



### Legal status of the request

'Abū Ḥanīfa and 'Abū Yūsuf (according to one report) ruled that once the preemptor makes his confirmation request, his preemption right is established and cannot be dropped by the mere passage of time. The majority of Ḥanafīs accepted this ruling, based on the view that once a legal right is firmly established, it can only be dropped if its owner drops it.

In contrast, Muḥammad ruled that if the preemptor waits another month after the confirmation request is made, without any excuse, his preemption is voided to protect the buyer's interest. Some Ḥanafīs found this opinion to be more appropriate for their time when people were deemed likely to intentionally cause harm to others. Indeed, *Al-Majallah* (item #1034) codified this opinion as law.

In this regard, the Ḥanbalīs ruled that if a request is made in front of witnesses, the preemptor has the right to demand taking the property from the buyer, even years later. Finally, the Mālikīs gave the preemptor a grace period of one full year. Thus, if he had no excuse, and still did not demand to take the property for a whole year after the contract, or kept his silence despite his knowledge that construction or demolition was taking place, his silence will be understood as unwillingness to take the property, and his preemption right will thus be dropped.

### 132.2.3 Demanding to take the property

Finally, the preemptor must present a formal legal request to take the property by preemption.<sup>9</sup> For instance, the preemptor may say to the judge: “So-and-so bought this property, for which I have preemption rights by virtue of owning this other property (or being a partner), and I now demand that the buyer gives it to me”.

### Delay penalties

The preemptor's right is dropped if he fails, without excuse, to make his first request during the session in which he first knows of the sale, i.e. if he turns to another matter or leaves the session without requesting preemption. On the other hand, if he had a valid excuse, his preemption right is not dropped until the circumstances preventing him from making the request (e.g. natural disasters) is removed.<sup>10</sup>

Moreover, the preemption right is dropped if the preemptor delays the second confirmation request for a period during which it could have been made, if only by letter, c.f. *Al-Majallah* (item #1034). Finally, if the preemptor delays the final request to take the property for a whole month, without a valid excuse such as being away, his preemption right is thus dropped, c.f. *Al-Majallah* (item #1034).

<sup>9</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, p.158).

<sup>10</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.18), *Al-Majallah* (item #1032).



### Preemption requests for an interdicted person

Most jurists allow children to take a property through interdiction. Thus, jurists of the four schools allow the child's guardian to exercise his preemption right if he finds it beneficial, and if the child has enough wealth to buy the property. In this case, the child is not allowed to void the preemption after reaching legal age.

'Abū Ḥanīfa and 'Abū Yūsuf ruled that if the child's guardian does not request the exercise of his preemption right, the child does not retain that right until he reaches legal age. They based this ruling on the view that the guardian who is allowed to exercise the preemption right, is also allowed to drop it, in analogy to the owner himself.

The Mālikīs and Shāfi'īs also ruled that the child does not have the right to exercise preemption if his guardian dropped that right according to what he found most beneficial for the child. Similarly, if the child did not have enough wealth to buy the property by preemption, his preemption right is automatically dropped. In such cases, the guardian is deemed to be acting within his authority, and thus the child is not allowed to void his actions, in analogy to returning purchased property. Moreover, the guardian in such cases is assumed to be acting in the best interests of the child. On the other hand, they ruled that if the guardian dropped the preemption right without considering its costs and benefits for the child, the right is not dropped, and the child may exercise it upon reaching legal age.

The Ḥanbalīs, and the Ḥanafī Zufar and Muḥammad ruled that a child may exercise his preemption right upon reaching legal age, whether or not his guardian dropped that right, and whether or not it was beneficial. They based this ruling on the view that the possessor of a preemption right may exercise it whether or not it is beneficial for him. Moreover, they reasoned, preemption is a right established for the child, and thus the guardian is not authorized to drop it. The final ruling is made in analogy to the case of an absent person whose agent fails to exercise his right.<sup>11</sup>

### The judge's role

If a preemptor requests buying a house based on preemption, the judge must first ask him regarding the location and boundaries of the house, to ascertain the legitimacy of his claim.<sup>12</sup> Then, the judge must ascertain that the buyer had indeed received the house, otherwise the claim will not be honored if the seller is not present.

<sup>11</sup>'Ibn Al-Humām ((Ḥanafī), vol.7, pp.436,451), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.263), *Al-Majallah* (item #1035), Al-Dardīr ((Mālikī)B, vol.3, p.645), Al-Dardīr ((Mālikī)A, vol.3, p.486), 'Ibn Qudāmāh (, vol.5, pp.313-4), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.161 onwards).

<sup>12</sup>'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.159), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.421), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.111), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.244 onwards).



Then, the judge must ascertain that the preemptor owns a property that gives him a preemption right, and ask the preemptor to define its borders to make sure that the preemption right is valid. Finally, the judge must ask when and where the confirmation request was made, and who were the witnesses. After making sure that the preemptor's claim is justified, and that he followed proper procedure, the claim becomes legally valid.

Then, the judge must ask the buyer regarding the preemptor's ownership of the property that entitles him to preemption. If the buyer denies that the preemptor owns that property, then the judge must require the preemptor to provide proof of ownership. This ruling follows from the fact that mere possession is insufficient to prove entitlement. Then, if the preemptor cannot provide proof of ownership, he may ask the buyer to take an oath that he does not know of the preemptor's ownership of said property. If the buyer refuses to take the oath, or if the preemptor can provide a proof of ownership, the right of preemption is thus established legally.

Moreover, the judge must ask the buyer if he had purchased the object of preemption. If he denies having bought it, the preemptor is asked to provide proof of the sale, since preemption is only established by virtue of that sale. If the preemptor cannot provide such a proof, he may ask the buyer to take an oath that he did not buy the property, or that his adversary has not established preemption right. If the buyer admits having bought the property or refuses to take an oath to the contrary, or if the preemptor can provide proof of the sale, he is thus granted the legal right of preemption, provided that the buyer does not deny his request to exercise his preemption right. On the other hand, if the adversary (buyer) takes an oath denying having bought the property, or having received a request of preemption at the appropriate time, his claim is accepted based on his oath.<sup>13</sup> In this regard, if the buyer denied the first request of preemption, his oath should be that he did not know about it. On the other hand, if he denied the confirmation request, he should take an oath that that request never took place.

In all of the above, note that the preemptor's adversary can always be the buyer, since he is an owner of the property after the sale, whether or not he had received the property. On the other hand, the preemptor may identify the seller as his adversary if the property was still in his possession. However, proofs against the seller are not considered until the buyer (and owner) arrives, and thus the sale cannot be voided in his absence. In contrast, the seller need not be present if the property was in the buyer's possession, since the seller in this case has neither ownership nor possession of the property in question.<sup>14</sup>

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<sup>13</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.158-160).

<sup>14</sup>Ibn 'Ābidīn ((Ḥanafī), vol.5, p.160).



## Chapter 133

# Changes in the Object of Preemption

The object of preemption may change in status while in the buyer's possession, before the preemptor's right is legally established. Thus, it may have been re-sold, given as a gift, leased, or loaned. Alternatively, additions to it may have been made, e.g. buildings or trees, or it may have suffered diminution. In what follows, we shall study the effect of all such changes on preemption.

### 133.1 Contracts and dealings

We consider dealings that transfer ownership, e.g. sale, gift with receipt, designation of property as dowry, or establishing as a *waqf*. We also consider dealings that transfer usufruct, e.g. leasing, simple loans, and pawning.

All four schools of jurisprudence agreed<sup>1</sup> that the preemptor is allowed to void re-sales of the property once the judge ruled that the preemptor is entitled to the property. This ruling results from the fact that such a ruling establishes that another had a right attached to the object of sale. They are also in agreement that pawning, leases, and simple loans of sold properties in which no preemption was present at inception are thus voided.

In the case of re-sale, they ruled that the preemptor is given the option of taking the property in exchange for its first price or its second price. Al-Sarakhsī ruled thus based on the view that each of those two sales establishes a preemption right, and the preemptor's right in the first sale is not voided by the second sale.

Moreover, the Ḥanafīs, Shāfi'īs, and Mālikīs agreed that preemption can void contracts in which no preemption could be established at the inception

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<sup>1</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.108 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.164), Al-Dardīr ((Mālikī)B, vol.3, p.652), 'Ibn Juzayy ((Mālikī), p.287), Al-Dardīr ((Mālikī)A, vol.3, p.493), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.303 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.382), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.169 onwards).



(e.g. established as *waqf*, Masjid, a cemetery, or given as a gift or in bequest).

In contrast, the Ḥanbalīs ruled that the preemption right is dropped if the buyer dealt in the property prior to the first request of preemption through a gift or charity, *waqf*, or other contracts with non-property compensations. They based this ruling on the view that preemption would harm the beneficiaries of the *waqf*, the recipient of a gift or charity, etc. without compensation in preemption, since no price was paid. Thus, preemption is voided in this case based on the principle that a harm cannot be removed by introducing another harm.

On the other hand, the Ḥanbalīs ruled that dealings of the buyer after the first request of preemption are not valid. They based this ruling on the majority view in their school that ownership of the property is transferred to the preemptor upon his request. Moreover, they ruled that if the buyer designated the purchased share in property in his will, the will is deemed invalid if the preemptor took the property prior to the buyer's death. This ruling was based on giving the preemptor's right priority over the beneficiary's right, since following a will after death is not binding.

## 133.2 Growth in the object of preemption

### 133.2.1 Natural growth

If the property grows naturally while in the buyer's possession, e.g. if trees bear fruit after he takes possession of what he purchased:

- The Ḥanafīs stated<sup>2</sup> that ruling by analogy would give the growth to the buyer and not to the preemptor, since the growth took place in the buyer's property, and with his knowledge. However, the ruling by juristic approbation, they said, would give all such growth to the preemptor, since fruits are derivative of the sold trees, and thus the preemptor's right to the trees extends to the fruits. This ruling agrees with the ruling for a sold animal that gives birth prior to receipt, where the buyer is entitled to the offspring.
- The Mālikīs ruled<sup>3</sup> that output prior to preemption belongs to the buyer, since he bears the responsibility for guaranteeing the property.
- The Shāfi'īs and Ḥanbalīs distinguished between two types of growth:<sup>4</sup>
  1. The preemptor is entitled to contiguous growth, such as very small fruits. They ruled that such additions are not distinguished in ownership from their origins, and thus ruled in analogy to returning such increases in sales if an option is exercised or the sale is revoked.

<sup>2</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.251), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.434), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.119), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, pp.164-5).

<sup>3</sup>Al-Dardīr ((Mālikī)B, vol.3, p.654).

<sup>4</sup>'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.382), 'Ibn Qudāmah (, vol.5, p.319 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.174).



2. The buyer is entitled to any separate growth, such as separate fruits, output, and rent. Such growth is deemed to have occurred in the buyer's property, and thus are not considered derivative of the object of sale. Thus, the preemptor would only be entitled to buying what was part of the original contract, and may only take the growth by mutual consent with the buyer.

In summary, we see that the Shāfi'is and Ḥanbalīs agreed with the ruling based on analogy, as described by the Ḥanafīs.

### 133.2.2 Caused increase

If the buyer added to the purchased property, e.g. by building on it, or planting trees or crops therein:

- If the increase was a crop with a known duration, all jurists agreed that the preemptor may take the land, the crop is kept till harvest time, and the buyer is entitled to the crop. In this case, the Ḥanafīs ruled that the buyer must thus pay the preemptor rent for the period between preemption and harvest.<sup>5</sup> In contrast, the Shāfi'is and Ḥanbalīs ruled that the crop was thus planted in the buyer's property, and he may keep it till harvest time without paying rent to the preemptor.<sup>6</sup>
- In the case of buildings and trees, the jurists ruled that the preemptor may take the land, but differed over compensation for the value of buildings or trees:
  - The Ḥanafīs ruled<sup>7</sup> that the preemptor is given the option of ordering the buyer to remove all additions at his own expense. In this case, the buyer is entitled to the rubble, since it belongs to him once separated from the preemptor's land. This option is allowed since the buyer thus put the trees or buildings in the property of others. Alternatively, they ruled, the preemptor may take the land for the price paid by the buyer, and pay the latter a compensation for the value of the building or trees if removed from the property (i.e. as rubble).
  - 'Abū Yūsuf, the Mālikīs, Shāfi'is, and Ḥanbalīs ruled<sup>8</sup> that the buyer has the option of removing the additions, provided that this does

<sup>5</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.115), Al-Kāsānī ((Ḥanafī), vol.5, p.27 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.164), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.250).

<sup>6</sup>'Ibn Qudāmah (, vol.5, p.319), Al-Ramlī ((Shāfi'ī), vol.4, p.154), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.304), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.174).

<sup>7</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.29), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.250), Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.114), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.164), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.118 onwards).

<sup>8</sup>'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.260), Al-Ramlī ((Shāfi'ī), ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), ibid.), 'Ibn Qudāmah (, vol.5, p.317 onwards), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.175).



not harm the land. They based this ruling on the view that those additions are his property, and thus he may remove them and take them, and is not required to flatten the land before leaving it, since he was not a transgressor. On the other hand, the buyer is also allowed in this case to leave the addition, in which case the preemptor has the option of dropping his preemption, or paying the buyer the value of the buildings and trees as they exist. This seems to be the more equitable solution.

'Ibn Rushd Al-Ḥafīd ((Mālikī)) stated that the difference in opinions in this case depends on whether the buyer's action is seen as a transgressor's act by adding to the property of the preemptor, or permissible actions that justify entitlement to the addition. Thus, the Ḥanafīs found the transgression aspect to be dominant, and ruled that the preemptor should pay the buyer the value of his buildings' rubble. In contrast, the non-Ḥanafīs found the buyer's entitlement to his additions to be dominant, and hence required the preemptor to compensate him for the full value of that added property.

### 133.3 Diminution in the object of preemption

The Ḥanafīs and Mālikīs had similar opinions in this regard, while the Shāfi'īs and Ḥanbalīs ruled differently. Thus, the Ḥanafīs considered whether the diminution pertained to the land itself, or some of its associated properties.<sup>9</sup>

1. If the diminution was derivative of the land, e.g. a removal of fruits, or destruction of farming equipment, and then the preemption right was legally established, the preemptor may deduct the value of the diminished property from the price he pays. They ruled thus, regardless of whether the diminution was caused by the buyer's actions (by taking some of what he had bought), or by natural causes. This ruling follows from the fact that such items were part of the sale, and thus must have an associated portion of the price deducted if they are not included.
2. If the diminution pertained to a property attached to the land (e.g. drying of trees, destruction of a building, etc.), and then the preemption right was legally established, the preemptor can deduct the diminished value from the price if the diminution was caused by the actions of the buyer or another person. Thus, the land value should be assessed with and without the lost properties, and the difference must be deducted from the price to be paid by the preemptor. This ruling follows from the fact that loss in this case was caused by transgression, and thus must correspond to part of

<sup>9</sup>Al-Sarakhsī (1st edition (Ḥanafī), vol.14, p.115), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.251 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.164 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.434), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.119), *Al-'Amwāl wa Naẓariyyat Al-'Aqd* by Dr. Muḥammad Yūsuf Mūsā (p.236 onwards).



the price. In this case, the buyer is entitled to the rubble of the destroyed property.

Alternatively, if the destruction was due to natural causes, the preemptor must pay the full price. In this case, the diminution in value was not a transgression, and the affected properties are derivative of the land and included implicitly in the sale. Thus, no portion of the price corresponds to those properties deemed to be among the description details of the land. In this case, if rubble remained, and the buyer took it by virtue of being separate from the land, the price should be reduced by the value of such rubble assessed on the day the buyer took it. If the destroyed property was a house, its value should be assessed on the day of sale, and the price should be reduced by the difference between the value of the house and the value of its rubble, as described above.

On the other hand, if the buyer did not take the rubble, it is considered derivative of the property, and no portion of the price is deducted thereof. Thus, once the property was taken by preemption, the sale was transferred from the buyer to the preemptor, and the loss of property by natural causes is borne by the latter.

3. If the diminished property was part of the land itself, the preemptor is given the option of dropping the preemption, or taking the remaining land in exchange for its portion of the price. This ruling follows from the establishment of the preemptor's right to take all of the land, and thus if only part thereof remained, he must pay only the corresponding part of the price.

The Mālikī rulings in this case are very similar to the Ḥanafī rulings. Thus, they ruled<sup>10</sup> that the buyer does not guarantee the property share made object of preemption against destruction by natural causes. Moreover, they ruled that the buyer does not guarantee the property against destruction that he caused for a beneficial reason (e.g. demolition of a building to widen a road). On the other hand, they ruled that if the buyer caused an unbeneficial diminution, he must guarantee the property against loss of value. Finally, if the buyer demolished a building and rebuilt it, the buyer is entitled to compensation for the value of the property on the day it was finished, since he was not transgressing. Thus, the preemptor should pay the price of the land, less the value of the rubble on the day of purchase, plus the value of the existing building.

The Shāfi'is and Ḥanbalīs ruled<sup>11</sup> that the buyer guarantees any diminution in the purchased property, since it is deemed to be a diminution in his property while in his possession. Then, they ruled, if the preemptor wishes to take the remaining part of the object of preemption, he must thus take it for its share of the price, whether the diminution was caused intentionally, unintentionally, or by natural causes. Finally, they ruled that if rubble exists, then the preemptor

<sup>10</sup> Al-Dardīr ((Mālikī)B, vol.3, p.654), Al-Dardīr ((Mālikī)A, vol.3, p.494).

<sup>11</sup> Ibn Qudāmah (, vol.5, p.320).



must take it along with the land, in exchange for its share of the price. If no rubble exists, then he merely takes the land and whatever remains on it.



## Chapter 134

# Dropping Preemption Rights

The reasons for dropping preemption rights can be inferred from the previous discussion of conditions for taking a property through preemption. Thus, we shall discuss the various means of dropping preemption rights briefly here, noting that some are agreed upon and some raise juristic differences.

### 134.1 Preemptor sale of his property

All jurists with the exception of the *Zāhiri* ibn ḥazm ruled that if the potential preemptor sold the property granting him preemption rights either before knowing of the sale, or afterwards but before having a legal establishment of preemption right, his preemption is voided. This ruling is based on the fact that the instigating factor for establishing preemption would thus be absent, since no harm can be prevented by its establishment for an ex-partner (or, for the *Ḥanafis* for an ex-neighbor).<sup>1</sup>

### 134.2 Voluntary dropping of the right

Preemption rights are dropped if the potential preemptor dropped his right verbally or implied his unwillingness to exercise it at sale time, whether or not he knew of the sale. Jurists of the four schools allowed preemption to be dropped thus, since preemption is a weak right that can be dropped quite easily.<sup>2</sup>

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<sup>1</sup>Ibn Al-Humām ((*Ḥanafī*), vol.7, p.446), Al-Zaylaʿī ((*Ḥanafī Jurisprudence*), vol.5, p.258), 'Ibn ʿĀbidīn ((*Ḥanafī*), vol.5, p.170), ʿAbd Al-Ḡhanī Al-Maydānī ((*Ḥanafī*), vol.2, p.113), 'Abū-'Ishāq Al-Shīrāzī ((*Shāfiʿī*), vol.1, p.381), Al-Buhūtī (3rd printing (*Ḥanbalī*), vol.4, p.169), 'Ibn Ḥazm (, vol.9, p.116 #1601), Al-Dardīr ((*Mālikī*)B, vol.3, p.642).

<sup>2</sup>Al-Sarakhsī (1st edition (*Ḥanafī*), vol.14, p.154 onwards), Al-Kāsānī ((*Ḥanafī*), vol.5, pp.19-20), Al-Zaylaʿī ((*Ḥanafī Jurisprudence*), vol.5, p.275), 'Ibn Al-Humām ((*Ḥanafī*), vol.7, pp.442-5), 'Ibn ʿĀbidīn ((*Ḥanafī*), vol.5, p.168 onwards), ʿAbd Al-Ḡhanī Al-Maydānī



Thus, the preemptor may drop his preemption right by explicitly saying so after the sale is concluded, and before it is legally established in court. This ruling follows from the fact that prior to the sale, the preemptor has no sale to drop, and after the court-order he can only transfer ownership of the property by another contract such as sale, gift, etc.

Moreover, any implicit sign that indicates the preemptor's acceptance of the sale, and transfer of ownership to the buyer, is deemed sufficient. For instance, if the potential preemptor fails to make the first or confirmatory requests of exercising his right, despite his ability to do so, his silence is considered a dropping of his right. Similarly, leaving the session in which he knew of the sale, or getting occupied by another matter, is taken to imply his consent to the sale, and its resulting establishment of buyer ownership.

Moreover, if the preemptor negotiates a price or rent to buy or lease the property from the buyer, that is taken as proof that he had decided not to exercise his preemption right. Also, if the preemptor served as the seller's selling agent, he would thus implicitly drop his preemption right, since he cannot void a contract he just helped conclude. On the other hand, the preemptor may act as the buyer's buying agent, and then take the property by preemption, since the purchase is not negated by the similar act of taking the property for himself. This is how the Ḥanafīs, and some Ḥanbalīs and Shāfi'īs ruled.

However, the majority of Shāfi'īs and Ḥanbalīs ruled<sup>3</sup> that preemption is not dropped by preemptor agency for the buyer or the seller. In this regard, they argued that suspicion of malicious intent does not matter, since the seller appointed the preemptor as his selling agent knowing that he may exercise his preemption right.

Two issues pertaining to taking dropped preemption rights were discussed by jurists in some detail. Some of those points were reported above, and thus we cover them here briefly:

- 'Abū Ḥanīfa and 'Abū Yūsuf ruled<sup>4</sup> that it is permissible for a father or guardian of a child to drop his preemption right. They based this ruling on the fact that taking a property through preemption is a form of commerce and financial dealing, and thus performing such actions or choosing not to perform them falls within the scope of a guardian's authority, in analogy to engaging or not engaging in any sale. Moreover, they reasoned that taking a property by preemption may be beneficial or harmful, and thus the guardian's judgment with regards to the child's benefit should be observed.
- The Mālikīs ruled in this case<sup>5</sup> that the guardian's or father's dropping of a child's preemption right is only valid if the dropping is in the child's

((Ḥanafī), vol.2, pp.112-3), Al-Dardīr ((Mālikī)B, vol.3, pp.642,645), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.380), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.306), 'Ibn Qudāmah (, vol.5, p.349 onwards), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.259), 'Ibn Juzayy ((Mālikī), p.286).

<sup>3</sup>'Ibn Qudāmah (, vol.5, p.351).

<sup>4</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.263), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.451), *Al-Majallah* (item #1035).

<sup>5</sup>Al-Dardīr ((Mālikī)A, vol.3, p.486), Al-Dardīr ((Mālikī)B, vol.3, p.645).



best interest. Otherwise, it is invalid, and the child may demand exercise of his preemption right upon reaching legal age.

- Zufar, Muḥammad, and the Ḥanbalīs ruled<sup>6</sup> that a guardian does not have the authority to drop a child's preemption right, whether or not it is for his benefit. Thus, the child's right remains intact, and the child may exercise it upon reaching legal age. They ruled thus by analogy to other legal rights that a guardian cannot drop for the child, e.g. the right to financial or physical compensation (*diyyah* or *qisāṣ*) for physical transgression. Moreover, since preemption was legalized to prevent harm for the child, dropping it is deemed a purely harmful action.

This same difference in opinion among the Ḥanafīs applies to the case of an agent who drops his principal's preemption right. In this case, 'Abū Ḥanīfa ruled that the agent's dropping of his principal's right in court is valid, based on the view that he takes the place of his principal in a court of law. 'Abū Yūsuf went further, ruling that an agent may drop his principal's preemption right in court as well as elsewhere, by virtue of unlimited agency rights. In contrast, Muḥammad and Zufar ruled that an agent is not permitted to drop his principal's preemption right.

- The Ḥanafīs ruled<sup>7</sup> that the preemption right may be dropped by the preemptor by taking a compensation for it in settlement. Thus, the act of settlement and taking of compensation is taken to imply unwillingness to exercise the right. However, they ruled, the preemptor in this case must return whatever compensation he took, since settlements and sales with mere legal rights are not allowed in the Ḥanafī school. In this regard, preemption is a mere right to own the property, legalized to prevent harm, and thus cannot be exchanged for any compensation, rendering the compensation an illegal bribe.

### 134.3 Guaranty of the price

The Ḥanafīs ruled<sup>8</sup> that the preemptor drops his preemption right if he guarantees the buyer's liability for the price towards the seller. They ruled thus based on the acceptance of the sale implicit in such guaranty. Similarly, they ruled that if the seller stipulated a condition in the sales contract that the preemptor has the option of allowing the sale to be concluded or voiding it, and the preemptor allowed it to be concluded, his preemption right is thus dropped. This seems to be the most appropriate ruling to follow.

In contrast, the Shāfi'īs and Ḥanbalīs ruled<sup>9</sup> that the preemption right is not

<sup>6</sup>Ibn Qudāmah (, vol.5, p.313), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.161 onwards).

<sup>7</sup>Al-Kāsānī ((Ḥanafī), vol.5, p.20), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.443), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.257), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.113), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.169).

<sup>8</sup>Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.258), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.447), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.113).

<sup>9</sup>Ibn Qudāmah (, vol.5, p.351), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.182).



dropped if the preemptor guaranteed the buyer's liability for the price to the seller, or if the seller gave him the option to void the contract and he allowed it to be concluded. They based this ruling on the view that a preemption right may only be dropped after the sale is binding, which is not the case in either example. Thus, such actions preceding the establishment of preemption rights cannot drop them, in analogy to giving a prior permission to sell, or dropping the right prior to completion of the sale, which do not drop the subsequent right.

### 134.4 Division of the object of preemption

Jurists are in agreement<sup>10</sup> that preemption rights cannot be divided. Thus, if the preemptor drops his right for any part of the object of preemption, his entire preemption right is thus dropped. This ruling is based on the principle that partitioning the purchase harms the buyer, and the principle that a potential harm (to the preemptor) cannot be remedied by introducing another harm (to the buyer). However, 'Abū Yūsuf and most Ḥanafīs ruled that the preemption right is not dropped if the preemptor asks to take only half of the object of preemption; and he retains the right to either take all of it or leave it all.

If there are multiple preemptors, neither of them is allowed to give his share to another preemptor. If any preemptor attempts to give his share to another, he would thus drop his preemption right, c.f. *Al-Majallah* (item #1042).<sup>11</sup> If one of two preemptors drops his right prior to the court order, the other preemptor is thus allowed to take the entire object of preemption. On the other hand, if one preemptor dropped his right after the court order, then the other preemptor does not have the right to take his share, c.f. *Al-Majallah* (item #1043).

### 134.5 Death of a preemptor

The Ḥanafīs ruled<sup>12</sup> that the preemption right is dropped upon death of the preemptor if he died prior to receiving the property or a court order, regardless of whether he died before or after the first or confirmatory requests of exercising his right. They based this ruling on their view that preemption rights cannot be inherited, in analogy to other legal rights such as conditional options. Moreover, they ruled that when the preemptor died, ownership was thus transferred to his heir, and the preemption condition of ownership was voided. On the other hand, they ruled that preemption is not voided upon the buyer's death, since the object of preemption and its justification remains in this case.

<sup>10</sup> Al-Kāsānī ((Ḥanafī), vol.5, p.21), 'Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.258), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.306), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.381), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.164), 'Ibn Hazm (, vol.9, p.118 #1604).

<sup>11</sup> 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), ibid.), Al-Kāsānī ((Ḥanafī), vol.5, p.5 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.173).

<sup>12</sup> 'Ibn 'Ābidīn ((Ḥanafī), vol.5, p.170), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.446), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.257), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.113), Al-Kāsānī ((Ḥanafī), vol.5, p.22), *Al-Majallah* (item #1038).



The Zāhirīs and Ḥanbalīs ruled<sup>13</sup> that death of the preemptor prior to requesting exercise of his right drops that right.<sup>14</sup> Moreover, they ruled that heirs have no right to exercise such preemption rights, since this right was assigned to the preemptor alone, and options cannot be bequeathed. On the other hand, they ruled that if the preemptor had issued the confirmatory request to exercise his right, in front of witnesses, then his heirs may demand exercising preemption. In this case, the preemptor is unable to exercise the right himself, but having witnesses for the confirmatory request takes the place of exercising the right himself, and thus the heirs may exercise it on behalf of his estate.

Thus, we see that the Zāhirīs and Ḥanbalīs agreed with the Ḥanafīs that preemption rights are not inherited if the preemptor died prior to requesting their exercise.

In this regard, the Mālikīs and Shāfi'īs ruled<sup>15</sup> that preemption rights are inherited if the preemptor requested their exercise prior to dying. Thus, they classified preemption rights at this stage as established legal options to avoid financial harm, and thus it may be inherited in analogy to defect options.

Moreover, references of other schools suggest that the Mālikīs and Shāfi'īs also allowed preemption rights to be bequeathed, even if the preemptor died prior to requesting their exercise. However, at least for the Shāfi'īs, it is well known that the preemptor request is required, otherwise they agree with the Ḥanbalīs and deem the preemption right dropped.<sup>16</sup>

In summary, the Ḥanafīs ruled that preemption rights are not inherited, even if the preemptor died after making the request, while the Mālikīs, Shāfi'īs, Ḥanbalīs, and Zāhirīs ruled that they are inherited in that case. This difference in opinion only applies in the case where the preemptor died prior to a court order establishing his preemption. On the other hand, all jurists agree that if he died after a court order gives him the right, but prior to paying the price and receiving the object of preemption, the sale is still binding for his heirs.

We conclude the following three points from our discussion of dropping preemption rights:<sup>17</sup>

1. Preemption is a weak right, fortified and confirmed by requesting its exercise.
2. Preemption was legalized to protect the preemptor's interests. All jurists agree that a partner in the property is a preemptor, but the Ḥanafīs included neighbors as well.

<sup>13</sup>Ibn Ḥazm (, vol.9, p.117 #1603), 'Ibn Qudāmah (, vol.5, p.346), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.176).

<sup>14</sup>Thus, 'Imām 'Aḥmad said that death voids three things: preemption rights, physical punishment if the victim of libel died, and options if the one who stipulated them died.

<sup>15</sup>Ibn Rushd Al-Ḥafīd ((Mālikī), vol2, p.260), 'Ibn Juzayy ((Mālikī), p.287), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.383), Al-Ramlī ((Shāfi'ī), vol.4, p.158).

<sup>16</sup>On the other hand, the Mālikīs allowed the preemptor a grace period of one year to make his request. Thus, if he died prior to making the request, the right is inherited by his heirs, unless the judge had dropped that right if the buyer requested that he must reveal his intention to the judge.

<sup>17</sup>*Al-'Amwāl wa Naẓariyyat Al-'Aqd* by the late Dr. Mūsā (p.238).



3. Preemption cannot result in a harm to the buyer by partitioning the sale, e.g. if the preemptor requests to take only part of the object of sale and preemption.



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